TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 1029 634
163-689

LAURA P. DUVAL ET AL., Petitioners,

vs.

PULLMAN PALACE CAR COMPANY.

Certified copy of record from the United States Circuit Court of Appeals for the Fifth Circuit, in the cause of Laura P. Duval et al., Plaintiffs in Error, vs. Pullman Palace Car Company, Defendant in Error.

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

Transcript

of

Register

1895-

988

1838

64-896

LAURA P. DUVAL ET AL., Plaintiffs in Error,

v.

PULLMAN PALACE CAR COMPANY, Defendant in Error.

INDEX.

	Original.	Print.
Caption	0	0

INDEX TO TRANSCRIPT OF RECORD.

Caption	1	1
Transcript of the Record in No. 2225	1	1
Transcript of the Record in No. 2224	11	11
Defendant's 1st Amended Original Answer. No. 2225	21	21
Defendant's 1st Amended Original Answer. No. 2224	24	24
Agreement to Consolidate	26	26
Judgment in No. 2225	27	27
Judgment in No. 2224	28	28
Plaintiffs' Motion for a New Trial	52	52
Judgment Overruling said Motion	55	55
Plaintiffs' Bill of Exceptions	29	29
Petition for Writ of Error	55	55
Bond for Writ of Error	56	56
Assignment of Errors	57	57
Writ of Error	61	61
Citation in Error	62	62
Clerk's Certificate	63	63
Hearing and Submission	64	63
Judgment	65	64
Petition for Rehearing	66	64
Rehearing Refused	71	67
Opinion	71	68
Certificate of Clerk	79	73

UNITED STATES OF AMERICA, FIFTH JUDICIAL DISTRICT.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun and held pursuant to law in the Court Room of said Court in the City of New Orleans, State of Louisiana, on the third Monday of November, in the year of our Lord one thousand eight hundred and ninety-three, before the Honorable Don A. Pardee, United States Circuit Judge for the Fifth Judicial Circuit, and the Honorable Harry T. Toulmin, United States District Judge for the Southern District of Alabama.

Laura P. Duval et al.
No. 180. *vs.*
Pullman Palace Car Company.

Be it Remembered, that heretofore, to-wit: on the 16th day of August, A. D. 1893, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Western District of Texas was filed in the office of the Clerk of said United States Circuit Court of Appeals, and is in the words and figures following, to-wit:

AUSTIN, TEXAS, July 27, 1893.

Be it Remembered, That there was opened and begun to be holden a regular term of the United States Circuit Court of the Fifth Circuit and Western District of Texas, at the City of Austin, in said Circuit and District, on the 6th day of February, 1893, it being the first Monday in February, and the day fixed by law for commencing a regular term of said Court at said place.

Present: The Hon. Thomas S. Maxey, United States District Judge for the Western District of Texas.

A. J. Evans, United States Attorney for said District.

Paul Fricke, United States Marshal for said District, and

B. G. Duval, Clerk of said Court.

When and where the following proceedings were had, to-wit:

In the Circuit Court of the United States,
For the Western District of Texas.
In the Fifth Circuit. At Law.
Consolidated Nos. 2225 and 2224.

Laura P. Duval, Plaintiff,

No. 2225. *vs.*

The Pullman Palace Car Company, Defendant,

and

Mary D. Maddox et al., Plaintiffs,

No. 2224. *vs.*

The Pullman Palace Car Company, Defendant.

Transcript from Travis County, Texas, District Court:

The State of Texas, } In the 53rd Judicial District Court, Travis
County of Travis. } County, January Term, A. D. 1892.

To the Hon. James H. Robertson, Judge of said Court:

The petition of Laura P. Duval, plaintiff, complaining of the Pullman Palace Car Company, defendants, represents:

1st. That plaintiff is a *feme sole*, and resides in Travis County, Texas. That the defendant is a corporation duly organized under and by virtue of the laws of Illinois; doing business in the State Texas, and having a local agent in the County of Travis and State of Texas, the said agent being P. J. Lawless.

2nd. That the said defendant corporation was on, to-wit: the 27th day of September, A. D. 1891, long prior thereto, and has been continuously, since that date, engaged in the business of carrying passengers as common carriers for hire by means of railroad cars running throughout the United States, and particularly between the cities of Denver, in the State of Colorado, and Fort Worth, in the State of Texas.

3rd. That heretofore, to-wit: on the 27th day of September, A. D. 1891, the plaintiff, being then aged, infirm and crippled, traveling in company with her daughter, Mary D. Maddox, and her delicate little grand-daughter, Fannie Maddox, engaged passage from the city of Denver, in the State of Colorado, to Fort Worth, in the State of Texas, over that line of railway traversed by defendant's cars, to-wit: the Fort Worth and Denver railway, paying the usual and customary fare for said passage. That at the time plaintiff engaged passage and purchased her ticket over said line of railway she applied for, as hereinafter recited, the drawing or state room in defendant's car, then and there carefully and fully explaining to the defendant's agent at Denver, Colorado, why she desired the drawing or state room in defendant's car, and called his attention to her condition, she being then in an invalid's chair and unable to walk. That this plaintiff then and there paid to the defendant corporation, through its agent, the sum of Twenty Dollars, that being the amount charged by the defendant for carrying plaintiff and her companions over said line of railway from Denver, Colorado, to Fort Worth, Texas, in its Pullman or Palace Car; and the defendant did then and there deliver to the plaintiff a ticket or check by which the defendant bound and obligated itself to carry plaintiff from Denver, Colorado, to Fort Worth, Texas, in its Pullman or Palace Car believed to be named "Isodora," and in the state or drawing room of said car Isodora; which printed ticket or check this plaintiff afterwards, during said trip, delivered to the defendant's conductor of said car, and which ticket is now in the possession of the defendant, and the defendant is now notified to produce the same upon the trial of this cause, or secondary evidence of its contents will be given.

4th. That the plaintiff, Laura P. Duval, after paying for and receiving her ticket, and evidence of the right to ride in the car Isodora as aforesaid, did enter said state or drawing room of said car and began her journey from Denver, Colorado, to Fort Worth, Texas, on, to-wit: the 27th day of September, A. D. 1891, at about the hour of 8:30 A. M. That, at that hour, the condition of the road over which defendant's car had to pass was well known to the defendant corporation, but unknown to this plaintiff. That, well knowing the condition of said line of road, and that it would be impossible for the defendant's car to pass over the same, the defendants did wrongfully, maliciously and illegally conceal said fact from this plaintiff, and did enter into a contract with her to convey her over said line of road comfortably and securely.

5th. That thereafter, to-wit: about the hour of 10 P. M. on the said 27th day of September, 1891, while occupying said state or drawing room, and after she and her traveling companions had retired for the night, plaintiff for the first time was informed that there had been a washout at the Canadian River on said line of road over which she was compelled to travel, and over which the defendant had contracted to carry her. That she was then and there informed that she and her traveling companions would be required to get up and leave said car Isodora, because the conductor of said car had been instructed by telegraph from his principal to return said car to Denver; that she then and there objected and earnestly protested against the demand to leave said car, calling attention to her physical condition and explaining the great bodily pain and annoyance she would be subjected to if required to leave said car in the night and under the circumstances; but, being alone and unprotected, and in order to prevent forcible ejection from said car, she finally left the same as commanded, and the defendant corporation, in violation of its contract with plaintiff, and in wilful and wrongful violation of plaintiff's rights and privileges in the premises, refused to convey her further in said car.

The said car was well provided with all modern conveniences for comfort and pleasure to its occupants; that being ejected therefrom she was compelled to go to a hotel

at the town of Texline, on said line of railroad; that, at the time, it was raining, damp, and cold; this plaintiff was unable to walk, and was then and there subjected to the indignity and annoyance of being carried in the arms of a negro porter, from said car to said hotel, in the town of Texline. That, at said hotel, plaintiff could procure no bed or place of rest; that she and her traveling companions, as aforesaid, were compelled to wait, without sleep, or rest, or palatable food, for twenty-four hours, and until about 11 o'clock on the night of the 28th of September, when the next train from Denver, Colorado, to Fort Worth, Texas, arrived.

Plaintiff, with her traveling companions as aforesaid, and under and by direction of the defendant's agent, boarded this train to continue her journey, but found the sleeping or Pullman car, owned and controlled by this defendant and attached thereto, was not provided with state or drawing room, nor could this plaintiff procure in said car a berth of any character that could be occupied by herself and her companions; and because this defendant failed, neglected and refused to provide for plaintiff a seat or berth in said car, she, with great pain and bodily discomfort, was compelled to ride in the crowded passenger coach from the town of Texline to the Canadian river, the place where said washout had occurred, a distance of eighty miles; that, at this point, the railroad bridge across said river had been completely washed away, so that trains could not pass, and at great danger to life and much anxiety and uneasiness as to her own safety and that of her traveling companions, and great physical pain, plaintiff had to be carried by a man walking a narrow plank used for a bridge across said swollen river, which circumstance shocked and very much unsettled plaintiff's nervous system, and caused her much physical and mental suffering; and she had to ride across a rough and mountainous country four or five miles in order to reach this crossing, which, in her condition, was necessarily accompanied with great pain and anxiety; and that from this point she was transferred to another train going to Fort Worth, Texas, in which she completed her journey.

6th. That in forcibly and wrongfully ejecting plaintiff from the defendant's car, Isodora, as aforesaid, the defendant corporatiod wilfully, knowingly and maliciously violated its agreement to safely and securely carry plaintiff from Denver, Colorado, to Fort Worth, Texas, in one continuous journey in the car Isodora, and in the state or drawing room thereof; that the defendant corporation so acted with the intention to subject this plaintiff to the indignities, wrongs, and injuries as above recited, or at least in wilful and malicious disregard of plaintiff's rights under her contract, which resulted in said indignity, wrong and injury, by reason of which plaintiff is damaged as hereinafter recited.

7th. That by reason of said wrongful, malicious and wilful conduct on the part of the defendant corporation, this plaintiff was actually damaged in the sum of twenty dollars, paid by her to the defendant for passage from Denver, Colorado, to Fort Worth, Texas, as aforesaid, which amount the defendant has neglected, failed and refused to refund to this plaintiff; and by reason of said wrongful, wilful and malicious ejectment of plaintiff from said car Isodora, and violation of plaintiff's contract with the defendant, this plaintiff, from loss of sleep, deprivation of food, mental anguish and anxiety, and physical pain, resulting from exposure and cold, as aforesaid, was damaged in the sum of Twenty Thousand Dollars ($20,000).

8th. That by reason of the afore aid wrongful, malicious, wilful and oppressive disregard of plaintiff's rights, and her ejectment from the car Isodora as above recited, plaintiff has been further damaged in the sum of Five Thousand Dollars, for which she sues as exemplary damages.

9th. Wherefore, premises considered, plaintiff prays that the defendant be cited to answer this petition according to law; that upon final hearing she have judgment for her damages, actual and exemplary, for all costs in this behalf expended, and for such other relief, general and special, as the nature of the case may demand. As in duty, etc.,

WEST & McGOWN,
Attorneys for the Plaintiff, Laura P. Duval.

No. 10,182. Laura P. Duval v. Pullman Pal. Car Co. Plff's Orig. Petition. Filed Nov. 24, 1891, Jas. P. Hart, Clk.

Laura P. Duval
vs.
Pullman Car Co. } In Dist. Ct., Travis Co. 10,182.

1. Comes defendant and demurs to plaintiff's petition, and says the same is insufficient in form and substance and requires no answer, and of this it prays judgment of the Court.

2. And if defendant's demurrers be overruled, it denies, all and singular, the allegations in plaintiff's petition contained, demands strict proof, and puts itself upon the country.

PERCY ROBERTS and
WALTON, HILL & WALTON,
Attorneys for Defendant.

10,182. Laura P. Duval vs. Pullman Pal. Car Co., Def't. Original Answer. Filed Jan'y 5, 1892, Jas. P. Hart, Clerk.

The State of Texas, }
County of Travis. }

The State of Texas,

To the Sheriff or any Constable of Travis County—Greeting:

You are hereby commanded to summon Pullman Palace Car Company, a corporation, if to be found in your county, to be and appear before the Hon. District Court of Travis County, for the 53 Judicial District, at the next regular term thereof, to be held at the Court House of said County in the City of Austin, on the first Monday in January, A. D. 1892, then and there to answer a petition filed in said on the 24th day of November, A. D. 1891, in a certain suit No. 10,182, in which said suit Laura P. Duval is Plaintiff, and Pullman Palace Car Company is Defendant, the nature of the demand set out in said petition being an action for damages as follows: Actual damages in the sum of $20.00 money actually expended for a ticket from Denver, Colorado, to Fort Worth, Texas, over the Fort Worth & Denver Railway, in the Pullman Palace Car believed to be named the "Isodora," from which Plaintiff was wrongfully ejected by defendant's agents, in violation of plaintiff's contract with defendant, for which she sues for exemplary damages in the sum of

five thousand dollars; she further sues for the sum of $20,000 for loss of sleep, deprivation of food, mental anguish and anxiety and physical pain resulting from exposure and cold, all of which will more fully appear from Plaintiff's Original Petition, now on file in this office.

Herein fail not, but have you then and there before said Court this writ, with your return thereon endorsed, showing how you have executed the same.

Witness: James P. Hart, Clerk of the District Court of Travis County, and the seal of said Court attached, this the 28th day of November, A. D. 1891.

[SEAL] JAS. P. HART, *Clerk D. C. T. C.*

File No. 10,182. Laura P. Duval vs. Pullman Palace Car Co. Citation to Pullman Car Company. Issued 28 day of November, 1891, Jas. P. Hart, Clk. Filed 1 day of December, 1891, Jas. P. Hart, Clk.

Came to hand on the 30 day of November, 1891, at 9 o'clock A. M., and executed on the 1 day of December, 1891, by delivering to the within named defendant, Peter Lawless, local agent of the Pullman Palace Car Company, in person, a true copy of this citation.

R. E. WHITE,
Sheriff of Travis County.
By PECK, *Deputy.*

Laura P. Duval.
vs. 10,182.
Pullman Palace Car Co.

In 53 Jud. Dist. Court, Travis County.

To the Hon. Jas. H. Robertson, Judge of the 53 Judicial District of Texas:

The petition of the Pullman Palace Car Company represents:

That at the time of the commencement of this, the above styled and numbered suit, petitioner was and still is, as alleged in the plaintiff's petition, a corporation duly organized under and by virtue of the laws of the State of Illinois, and petitioner was at said commencement of suit and still is, as such corporation, a citizen of State of Illinois, and has never been incorporated under the laws of Texas, or taken out any permit to do business therein, and has never

been a resident of the State of Texas, but was at said commencement of suit, and still is, domiciled in and a resident of said State of Illinois.

That the plaintiff in said suit, Laura P. Duval, was at the commencement of said suit and still is a resident and citizen of the State of Texas. That the matter in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars.

Your petitioner makes and files herewith a bond with good and sufficient surety for its entering into the Circuit Court of the United States for the Western District of Texas, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said Circuit Court, if said Circuit Court shall hold that this suit has been wrongfully or improperly removed thereto.

Wherefore, it prays that this Honorable Court accept and allow this petition and said bond, and that no further proceedings be had in this Court, except to order the transfer thereof into said Circuit Court of the United States.

PERCY ROBERTS and
WALTON, HILL & WALTON.
Attys. for Petitioner, The Pullman Palace Car Co.

State of Texas, }
County of Travis. }

Before me, the undersigned authority, personally appeared N. S. Walton, who says upon his oath that he is an attorney of the Pullman Palace Car Company, and that the matters stated in the foregoing petition for removal are true.

N. S. WALTON.

Subscribed and sworn to before me this fifth day of January, A. D. 1892. JAS. P. HART, *Clk. Dist. Ct.*

10,182. Laura P. Duval vs. Pullman Palace Car Co. Petition for removal to U. S. Court. Filed Jany. 5, 1892, Jas. P. Hart, Clk.

Laura P. Duval
vs. 10,182.
Pullman Palace Car Co.

United States of America, Western District of Texas.

Know all men by these presents, that the Pullman Palace Car Company, as principal, and as sureties, are held and firmly bound unto Laura P. Duval, in the sum of Five Hundred Dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs and legal representatives jointly and severally by these presents;

Conditioned, however, that the said Pullman Palace Car Company having petitioned the District Court of Travis County, Texas, (being in the 53rd Judicial District of Texas), for the removal of a certain cause therein pending, wherein the said Laura P. Duval is plaintiff and said Pullman Palace Car Company is defendant, to the Circuit Court of the United States for the Western District of Texas.

Now, therefore, if the said Pullman Palace Car Company shall enter into the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said Circuit Court, if said Court shall hold that such suit was wrongfully or improperly removed thereto, then shall this obligation be void; otherwise of full effect.

Witness our hands, this the 4th day of January, A. D. 1892.

PULLMAN PALACE CAR COMPANY, by
WALTON, HILL & WALTON,
Its Att'ys of Record.

WALTON, HILL & WALTON,
N. S. WALTON,
R. J. HILL.

10,182. Laura P. Duval v. Pullman Palace Car Co. Bond for Removal. Filed Jany. 5, 1892, Jas. P. Hart, Clk. Examined & approved, this January 5, 1892, James H. Robertson, Judge 53rd Judicial District of Texas.

District Court, Travis Co., Texas.
January 5th, 1892.

Laura P. Duval,
10,182. *vs.*
Pullman Palace Car Company.

And now on this, the 5th day of January, 1892, came the parties, by their attorneys, and the cause having been regularly reached and called for trial, the Pullman Palace Car Company presented its petition and bond for the removal of this cause to the Honorable Circuit Court of the United States for the Fifth Circuit, Western District of Texas, Austin branch, and said petition and bond having been examined by the Court and found to be in due form, and the allegations in said petition not being controverted, said bond was by the Court approved and ordered filed, and ordered that all further proceedings in this cause be and the same and are hereby suspended, and that the Clerk of this Court make out a true copy of the record in this cause and file the same in the said Circuit Court of the United States on or before the first day of the next term thereof.

Bill of Costs.

Laura P. Duval
10,182. *vs.*
Pullman Palace Car Co.

Clerk's Fees.

Docketing Suit	.20
Issuing Citation and Duplicate	.75
Entering Appearance	.30
" Orders and Decree	.75
Taking Affidavit	.50
Taking Bond	1.50
Filing Papers	.60
Taxing Cost	.25
Transcript	8.00
	$12.85

Sheriff's Fees.

White, Cit	1.60
Clerk's Costs	12.85
Total	$14.45

The State of Texas,
County of Travis.

I, Jas. P. Hart, Clerk of the District Court in and for said County and State, hereby certify that the foregoing 15 pages contain a true copy of the record in Cause No. 10,182, Laura P. Duval vs. Pullman Palace Car Company, as now on file and of record in my office.

Witness my hand and the seal of office in the City of Austin, Texas, this 28th day of January, A. D. 1892.

[SEAL] JAS. P. HART,
Clerk District Court, Travis Co., Texas.

No. 2225. Laura P. Duval vs. Pullman Palace Car Company. Transcript from Travis Co., Texas. Filed Jany. 29, 1892, B. G. Duval, Clerk, by D. H. Hart, Deputy.

The State of Texas, County of Travis. } In the District Court of Travis County, 53rd Judicial District, January Term, 1892.

To the Hon. James H. Robertson, Judge of said Court:

The petition of Mary D. Maddox, joined by her husband, John W. Maddox, plaintiff, complaining of the Pullman Palace Car Company, defendant, represents:

1st. That plaintiff, Mary D. Maddox, resides in Travis County, Texas, with her husband, John W. Maddox. That the defendant is a corporation, duly organized under and by virtue of the laws of Illinois; doing business in the State of Texas, and having a local agent in the County of Travis and State of Texas, the said agent being P. J. Lawless.

2nd. That the said defendant corporation was on, to-wit, the 27th day of September, A. D. 1891, long prior thereto, and has been continuously since that date, engaged in the business of carrying passengers as common carriers for hire by means of railroad cars running throughout the United States, and particularly between the cities of Denver, in the State of Colorado, and Fort Worth, in the State of Texas.

3rd. That therefore, to-wit, on the 27th day of September, A. D. 1891, the plaintiff, traveling in company with her delicate little daughter, Fannie, and her aged and crippled mother, Laura P. Duval, engaged passage from

the City of Denver, in the State of Colorado, to Fort Worth, in the State of Texas, over that line of railway traversed by said defendant's cars commonly known as the Fort Worth & Denver Railway, paying the usual and customary fare for said passage. That, at the time plaintiff engaged passage and purchased her ticket over said line of railway, she applied for, as hereinafter recited, the drawing or state room in defendant's car, then and there carefully and fully explaining to the defendant's agent at Denver, Colorado, why she desired the drawing or state room in defendant's car; and showed to him the condition of her mother, who was then in an invalid's chair and unable to walk. That plaintiff then and there paid to the defendant corporation, through its agent, the sum of twenty dollars, that being the amount charged by the defendant for carrying plaintiff and her companions over said line of railway from Denver, Colorado, to Fort Worth, Texas, in its Pullman or palace car; and the defendant then and there delivered to the plaintiff a ticket or check by which the defendant bound and obligated itself to carry plaintiff from Denver, Colorado, to Fort Worth, Texas, in its Pullman or palace car believed to be named "Isodora," and in the state or drawing room of said car "Isodora;" which printed ticket or check this plaintiff afterwards, during said trip, delivered to the defendant's conductor of said car, and which ticket is now in the possession of the defendant; and the defendant is now notified to produce the same upon the trial of this cause, or secondary evidence of its content will be given.

4th. That plaintiff, Mary D. Maddox, after paying for and receiving her ticket and evidence of right to ride in the car Isodora, as aforesaid, did enter said state or drawing room of said car, and began her journey from Denver, Colorado, to Fort Worth, Texas, on, to-wit: the 27th day of September, A. D. 1891, at about the hour of 8:30 A. M.

That at that hour, the condition of the line of road over which defendant's car had to pass was well known to the defendant corporation, but unknown to this plaintiff. That, well knowing the condition of said road, and that it would be impossible for the defendant's car to pass over the same, the defendant did wrongfully, maliciously, and illegally

conceal said fact from this plaintiff, and did enter into a contract with her to convey her over said line of road comfortably and securely.

5th. That thereafter, to-wit: about the hour of 10 P. M., on the said 27th day of September, A. D. 1891, the said plaintiff, while occupying said state room or drawing room car, and after she and her companions had retired for the night, for the first time was informed that there had been a washout at the Canadian River, on said line of road, over which she was compelled to travel, and over which the defendant had contracted to carry her. That she was then and there informed that she and her delicate child, and aged and crippled mother would be required to get up and leave said car Isodora, because the conductor of said car had been telegraphed by his principal to return said car to Denver; that she then and there objected, and earnestly protested against the demand to leave said car; but being alone and unprotected, and in order to prevent forcible ejection from said car, she finally left the same as commanded; and the said defendant corporation, in violation of its contract with plaintiff, and in wilful and wrongful violation of plaintiff's rights and privileges in the premises, refused to convey her further in said car. That said car was well provided with all the modern convenience for comfort and pleasure to its occupants; that being ejected therefrom, she was compelled to go to a hotel at the town of Texline, on said defendant's line of road; that plaintiff could procure no bed or place of rest at said hotel; that she, and her child, and aged mother, as aforesaid, were compelled to wait, without sleep or rest or palatable food, for twelve hours, and until about 11 o'clock on the night of the 28th of September, when the next train from Denver, Colorado, to Fort Worth, Texas, arrived.

That the plaintiff, with her companions as aforesaid, under and by direction of the defendant's agent, boarded this train to continue her journey; but found the sleeping or Pullman car, owned and controlled by this defendant and attached thereto, was not provided with state or drawing rooms; nor could this plaintiff procure in said car a berth of any character that could be occupied by herself and companions; and because the defendant

failed, neglected and refused to provide for plaintiff a seat or berth in said car, she was compelled to ride in the negro coach, the coach for whites being fully occupied and without empty seats, from the town of Texline to the Canadian River, the place where said wash-out had occurred, a distance of eighty miles; that at this point the railroad bridge across said river had been completely washed away, so that trains could not pass, and at great danger to life, and with much uneasiness and anxiety as to her own safety and that of her delicate child and of her aged mother, plaintiff had to cross on a narrow plank used for a bridge across the swollen river, which shocked and very much unsettled plaintiff's nervous system and caused her much mental and physical suffering and anxiety on her own account, and on account of her child and aged mother, and had to ride across a rough and mountainous country in order to reach this crossing, a distance of four or five miles, in a stage, from which point she was transferred to another train going to Fort Worth, upon which she completed her journey.

6th. That in forcibly and wrongfully ejecting plaintiff from defendant's car Isodora, the defendant corporation wilfully, knowingly and maliciously violated its agreement to safely and securely carry plaintiff from Denver, Colorado, to Fort Worth, Texas, in one continuous journey in said car Isodora, and in the state or drawing room thereof. The defendant corporation so acted with the intention to subject plaintiff to indignities, wrong and injuries, as above recited, or at least with wilful and malicious disregard of plaintiff's rights under her contract, which resulted in said indignity, wrong and injury, by reason of which plaintiff is damaged as hereinafter recited.

7th. That by reason of said wrongful, malicious and wilful conduct on the part of the defendant corporation, this plaintiff was actually damaged in the sum of $20.00, paid by her to the defendant for passage from Denver, Colorado, to Fort Worth, Texas, as aforesaid, which amount the defendant has neglected, failed and refused to refund to this plaintiff, and by reason of said wrongful, wilful and malicious eject-

ment of plaintiff from said car Isodora, and violation of defendant's contract with plaintiff, this plaintiff, from the loss of sleep, deprivation of food, mental anguish and anxiety and physical pain, resulting from exposure and cold, as aforesaid, was damaged in the sum of $20,000.00.

8th. That by reason of the aforesaid wrongful, malicious, wilful and oppressive disregard of plaintiff's rights and the ejectment from the car Isodora, as above recited, plaintiff has been further damaged in the sum of $5000, for which she sues as exemplary damages.

9th. Wherefore, premises considered, plaintiff prays that the defendant be cited to answer this petition according to law, that upon final hearing she have judgment for her damages, actual and exemplary, for all costs in this behalf expended, and for such other relief, general and special, as the nature of the case may demand. As in duty, etc.

WEST & McGOWN,
Attys. for Plff., Mrs. Maddox.

No. 10,183. Mary D. Maddox et al. v. Pullman Palace Car Company. Plffs' Original Petition. Filed Nov. 24, 1891. Jas. P. Hart, Clk.

Mary D. Maddox et al.
10,183. *vs.* } In District Court, Travis Co.
Pullman Palace Car Co.

And now comes defendant and demurs to plaintiff's petition and says the same is insufficient in form and substance and requires no answer, and of this it prays judgment of the Court.

2. And if demurrer be overruled, defendant denies all and singular the allegations in plaintiff's petition, demands strict proof, and puts itself upon the country.

PERCY ROBERTS and
WALTON, HILL & WALTON,
Att'ys for Def't.

Mary D. Maddox et al. v. Pullman Pal. Car Co. Defendant's Original Answer. Filed Jan'y 5, 1892. Jas. P. Hart, Cl'k.

The State of Texas, }
County of Travis. }

The State of Texas,

To the Sheriff or any Constable of Travis County—Greeting:

You are hereby commanded to summon Pullman Palace Car Company, a corporation, if to be found in your county, to be and appear before the Hon. District Court of Travis County, for the 53d Judicial District, at the next regular term thereof, to be held at the Court House of said County, in the City of Austin, on the first Monday in January, A. D. 1892, then and there to answer a petition filed in said Court on the 24th day of November, A. D. 1891, in a certain suit, No. 10,183, in which said suit Mary D. Maddox and John W. Maddox are plaintiffs and Pullman Palace Car Company is defendant, the nature of the demand set out in said petition being an action for damages, as follows: Actual damages in the sum of $20,000, money actually expended for a ticket from Denver, Colorado, to Fort Worth, Texas, over the Fort Worth and Denver Railway, in the Pullman Palace Car believed to be named the "Isodora," from which plaintiff, Mary D. Maddox, was wrongfully ejected by defendant's agents, in violation of plaintiff's contract with defendant, for which she sues for exemplary damages in the sum of five thousand dollars; she further sues for the sum of $20,000.00, for loss of sleep, deprivation of food, mental anguish and anxiety and physical pain resulting from exposure and cold; all of which will more fully appear from plaintiff's original petition, now on file in this office.

Herein fail not, but have you then and there before said Court this writ, with your return thereon endorsed, showing how you have executed the same.

Witness: James P. Hart, Clerk of the District Court of Travis County, and the seal of said Court attached, this the 28th day of November, A. D. 1891.

[SEAL] JAS. P. HART, *Clerk D. C. T. C.*

File No. 10,183. Mary D. Maddox et al. vs. Pullman Palace Car Company. Citation to Pullman Palace Car Company. Issued 28th day of November, 1891, Jas. P. Hart, Clerk. Filed 1 day of Dec., 1891, Jas. P. Hart, Clerk.

Came to hand on the 30th day of November, 1891, at 9 o'clock A. M., and executed on the 1 day of December, 1891, by delivering to the within named defendant, Peter J. Lawless, local agent of the Pullman Car Company, in person, a true copy of this citation.

R. E. WHITE, *Sheriff of Travis County.*
By PECK, *Deputy.*

Mary D. Maddox and Jno. W. Maddox *vs.* Pullman Palace Car Company.	In 53d Judicial District, Travis County, Texas. No. 10,183.

To the Hon. Jas. H. Robertson, Judge of the 53d Judicial District of Texas:

The petition of the Pullman Palace Car Company represents:

That at the time of commencement of this, the above styled and numbered suit, petitioner was and still is, as alleged in the plaintiffs' petition, a corporation, duly organized under and by virtue of the laws of the State of Illinois, and petitioner was, at said commencement of suit, and still is, as such corporation, a citizen of the State of Illinois, and has never been incorporated under the laws of Texas, or taken out any permit to do business therein; and has never been a resident of the State of Texas, but was at said commencement of suit, and still is, domiciled in and a resident of the State of Illinois.

That the plaintiffs in said suit, Mary D. Maddox and John W. Maddox, were, at the commencement of said suit, and still are, residents and citizens of the State of Texas.

That the matter in dispute in said suit exceeds, exclusive of interest and cost, the sum or value of Two Thousand Dollars.

You petitioner makes and files a bond with good and sufficient surety for its entering into the Circuit Court of the United States for the Western District of Texas, on the first day of its next session, a copy of the record in this suit, and for paying all cost that may be awarded by the said Circuit Court, if said Circuit Court shall hold that this suit has been wrongfully or improperly removed thereto.

be in due form, and the allegations in said petition not being controverted, said bond was by the Court approved and ordered filed, and ordered that all further proceedings in this cause be and the same are hereby suspended, and that the Clerk of this Court make out a true copy of the record in this cause and file the same in said Circuit Court of the United States on or before the first day of its next term thereof.

Bill of Costs.

Mary D. Maddox
vs. No. 10,183.
Pullman Palace Car Co.

Clerk's Fees.

Docketing suit	$ .20
Issuing Citation and Duplicate	.75
Entering Appearance	.30
" Orders and Decree	.75
Taking Affidavit	.50
Taking Bond	1.50
Filing Papers	.60
Taxing Cost	.25
Transcript	8.00
	$12.85

Sheriff's Fees.

White, Cost	$1.60
Clerk's Costs	12.85
Total	$14.45

The State of Texas,
County of Travis.

I, Jas. P. Hart, Clerk of the District Court in and for said County and State, hereby certify that the foregoing 15 pages contain a true copy of the record in Cause No. 10,183, Mary D. Maddox et als. vs. Pullman Palace Car Company, as now on file and of record in this office.

Witness my hand and official seal at office in the City of Austin, this 28th day of January, A. D. 1892.

[SEAL] JAS. P. HART,
Clerk District Court Travis Co., Texas.

No. 2224. Mary D. Maddox et al. vs. Pullman Palace Car Company. Transcript from Travis Co., Texas. Filed Jany. 29, 1892, B. G. Duval, Clerk, by D. H. Hart, Deputy.

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWERS.

Laura P. Duval
vs. No. 2225 Law,
The Pullman Palace Car Company.

In U. S. Circuit Court, Western District Texas, at Austin.

And now in this cause comes the defendant, and by leave of Court files this, its first amended original answer, in lieu of its original answer, filed on January 5th, 1892, and says:

1. Defendant demurs to plaintiff's original petition, and says the same is insufficient in form and substance, and shows no cause of action, and of this it prays judgment of the Court.

2. And more specially demurring to said petition, defendant says the same is insufficient because it does not appear from the allegations therein that defendant contracted with plaintiff for transportation as a passenger, or undertook or bound itself to carry plaintiff, or to do more than furnish her the comforts of said sleeping car during the journey for which she had contracted with the said railroad Co. to carry her, and because it appears therefrom that it performed said contract as far as possible, and that in so far as there was any failure so to do, such failure is excused by a *vis major*, to-wit: the washing out of said bridge, and of this it prays judgment.

3. And further, defendant specially excepts to all parts of said petition setting up mental anguish or annoyance, apprehension or other emotion or sensations of the mind as a basis of damages or cause of action, because the same constitute no cause of action, and of this it prays judgment.

4. And further, defendant specially excepts to all parts of said petition alleging malice and claiming punitive or

Wherefore, it prays that this Honorable Court accept and allow this petition, and said bond, and that no further proceedings be had in this Court, except to order the transfer thereof into said Circuit Court of the United States.

PERCY ROBERTS and
WALTON, HILL & WALTON,
Attorneys for Petitioner, the Pullman Palace Car Company.

State of Texas, }
County of Travis. }

Before me, the undersigned authority, on this day, personally appeared N. S. Walton, who being duly sworn, says, upon his oath, that he is an attorney of the Pullman Palace Car Company, and that the matters stated in the foregoing petition for removal are true.

N. S. WALTON.

Subscribed and sworn to before me this Jany. 5th, 1892.

JAS. P. HART, *Clerk.*

No. 10,183. Mary D. Maddox and John W. Maddox vs. Pullman Palace Car Company. In 53d Judicial District, Texas. Defendant's Original Petition for Removal to U. S. Circuit Court. Filed Jany. 5th, 1892. Jas. P. Hart, Clk.

Bond for Removal into the United States Circuit Court.

No. 10,183.

Mary D. Maddox and John W. Maddox, *versus* Pullman Palace Car Company. } United States of America, Western District of Texas.

Know all men by these presents, that the Pullman Palace Car Company as principal, and.....and..... as sureties, are held and firmly bound unto Mary D. Maddox and John W. Maddox in the sum of Five hundred dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs and legal representatives jointly and severally by these presents;

Conditioned, however, that the said Pullman Palace Car Company, having petitioned the District Court of Travis County, Texas, it being the 53d Judicial District of Texas,

for the removal of a certain cause therein pending therein, wherein the said Mary D. Maddox and *and* the said John W. Maddox are plaintiffs, and the said Pullman Palace Car Company is defendant, to the Circuit Court of the United States for the Western District of Texas.

Now, therefore, if the Pullman Palace Car Company shall enter in the said Circuit Court of the United States on the first day of its next term or session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, then shall this obligation be void; otherwise in full force and effect.

Witness our hands on this, the 4th day of January, A. D. 1892.

PULLMAN PALACE CAR COMPANY, by
WALTON, HILL & WALTON,
Its Att'ys of Record.
WALTON, HILL & WALTON,
N. S. WALTON,
R. J. HILL.

Examined & approved, this Jany. 5, 1892, James H. Robertson, Judge 53rd Judicial District of Texas.

No. 10,183. Mary D. Maddox and John W. Maddox vs. Pullman Palace Car Company. Bond for removal to U. S. Circuit Court. Filed Jany. 5, 1892. James P. Hart, Clk.

District Court, Travis Co., Texas.
January 5th, 1892.

Mary D. Maddox et al.
10,183 *vs.*
Pullman Palace Car Company.

And now, on this, the 5th day of January, 1892, came the parties, by their attorneys, and this cause having been regularly reached and called for trial, the defendant Pullman Palace Car Company presented its petition and bond for the removal of this cause to the Honorable Circuit Court of the United States for the Fifth Circuit, Western District of Texas, Austin Branch, and said petition and bond having been examined by the court and found to

exemplary damages, because the acts complained of do not appear to have been acts of defendant's corporate officers or acts ratified by them, and of this it prays judgment.

5. And if defendant demurrers be overruled and any answer required, it denies all and singular the allegations in said petition contained, demands strict proof, and puts itself upon the country.

6. And more specially answering, defendant specially denies that it was at the time and place alleged a common carrier, or public carrier of passengers, or that it then or at any other time held itself out as such to the public generally or to the plaintiff specially; and

7. Defendant specially denies that it ever entered into any contract with plaintiff for transportation; but

8. Defendant avers, that the contract for transportation, if any, made by plaintiff on said 27th day of Sept., 1891, from Denver, Colo., to Fort Worth, Texas, was made with the said railroad company, to-wit: the Ft. Worth and Denver Railway Co., to which contract this defendant was neither a party or privy, and this it is ready to verify.

9. And further specially answering, defendant says that plaintiff ought not to recover herein, because it is in nowise responsible for the facts complained of, because the movements of said car Isodora, and the conduct thereof as a vehicle of transportation, during the time plaintiff was a passenger therein, and prior and subsequent thereto, were not under the control of defendant, but said car was leased to said railroad company for its use in the transportation of its passengers, and was then and there, as to its movements, wholly under the control of said railroad co., and whatever contract was made between plaintiff and defendant concerned the enjoyment of the comforts of said car during its transportation and control by said railroad company, for and during such part of plaintiff's said journey, as the said railroad co. should transport said car, and not otherwise, and defendant says that such was then and had long been the usual and customary relations between such railroad companies and companies in defendant's business, and this it is ready to verify.

10. And further specially answering, defendant says

plaintiff ought not to recover herein, because, or on account of the failure of the turning back of said car, and her consequent deprival of the comforts thereof further than said town of Texline, because the same were acts not done, authorized, or consented to by this defendant, and in which it took no part, and this it is ready to verify.

11. And further specially answering, defendant says, that although it was in nowise responsible for the acts complained of, as aforesaid, yet if it should be deemed in law responsible for the failure of said car to go beyond Texline, on said night of Sept. 27th, 1891, or for the failure of plaintiff to enjoy said state room as far as said railway track was unobstructed, defendant says that in the presence of the dangers and perils of said journey, caused by said washing out of said bridges of said railway company, an overruling necessity therefor existed, and defendant says that said stopping at Texline was made instead of continuing said journey to the margin of said broken bridge, because said Texline was the nearest place thereto where passengers could get any accommodations of food and shelter, there being no such provision for the public at said bridge; wherefore it says it was expedient that said car should be delayed at said town instead of said bridge, for the time until the emergency was provided for, and its occupants could go forward on their journey; and defendant says that whatever inconvenience and privations plaintiff suffered were caused by said accident, and the failure of said railway company to draw said car to Ft. Worth; that defendant, through its agents, did all it could to ameliorate the condition of plaintiff and provide for her comfort, and so soon as it was able to provide her the accommodations contracted for, it provided the same for her use on the remainder of the said journey; all of which it is ready to verify, and it prays judgment that it go hence with costs.

PERCY ROBERST and
WALTON, HILL & WALTON,
Attys. for Defendants, the Pullman Palace Car Company.

2225 Law. Laura P. Duval vs. Pullman Palace Car Co.

Defendant's 1st Amended Original Answer. Filed Feby. 13, '93, B. G. Duval, Clerk, by D. H. Hart, D'y.

Mary D. Maddox et al. *vs.* No. 2224 Law, The Pullman Palace Car Company. } In U. S. Circuit Court Western District Texas, at Austin.

And now in this cause comes the defendant and by leave of Court, files this, its first amended original answer, in lieu of its original answer filed on January 5th, 1892, and says:

1. Defendant demurs to plaintiffs' original petition and says the same is insufficient in form and substance and shows no cause of action, and of this it prays judgment of the Court.

2. And more specially demurring to said petition, defendant says the same is insufficient, because it does not appear from the allegations therein that defendant contracted with plaintiff for transportation as a passenger or undertook or bound itself to carry plaintiff or to do more than furnish her the comforts of said sleeping car during the journey for which she had contracted with the said railroad co. to carry her, and because it appears therefrom that it performed said contract as far as possible, and that in so far as there was any failure so to do, such failure is excused by a *vis major*, to-wit, the washing out of the said bridge, and of this it prays judgment.

3. And further, defendant specially excepts to all parts of said petition setting up mental anguish or annoyance, apprehension or other emotion or sensations of the mind as a basis of damages or cause of action, because the same constitute no cause of action, and of this it prays judgment.

4. And further, defendant specially excepts to all parts of said petition alleging malice and claiming punitive or exemplary damages, because the acts complained of do not appear to have been acts of defendant's corporate officers or acts ratified by them, and of this it prays judgment.

5. And if defendant demurrers be overruled and any answer required, it denies all and singular the allegations in said petition contained, demands strict proof, and puts itself upon the country.

6. And more specially answering, defendant specially denies that it was at the time and place alleged a common carrier, or public carrier of passengers, or that it then, or at any other time, held itself out as such to the public generally or to the plaintiff specially; and

7. Defendant specially denies that it ever entered into any contract with plaintiff for transportation; but

8. Defendant avers, that the contract for transportation, if any, made by plaintiff on said 27th day of September, 1891, from Denver, Colorado, to Fort Worth, Texas, was made with the said railroad company, to-wit: the Ft. Worth and Denver Railway Co., to which contract this defendant was neither a party or privy, and this it is ready to verify.

9. And further specially answering, defendant says that plaintiff ought not to recover herein, because it is in nowise responsible for the facts complained of, because the movements of said car Isadora and the conduct thereof, as a vehicle of transportation, during the time plaintiff was a passenger therein and prior and subsequent thereto, were not under the control of defendant, but said car was leased to said railroad company for its use in the transportation of its passengers, and was then and there, as to its movements, wholly under the control of said railroad co., and whatever contract was made between plaintiff and defendant concerned the enjoyment of the comforts of said car during its transportation and control by said railroad company, for and during such part of plaintiff's said journey as the said railroad co. should transport said car and not otherwise, and defendant says that such was then, and had long been, the usual and customary relations between such railroad companies and companies in defendant's business, and this it is ready to verify.

10. And further specially answering, defendant says plaintiff ought not to recover herein, because, or on account of the failure of the turning back of said car, and her consequent deprival of the comforts thereof, further than said town of Texline, because the same were acts not done, authorized, or consented to by this defendant, and in which it took no part, and this it is ready to verify.

11. And further specially answering, defendant says that although it was in nowise responsible for the acts complained of as aforesaid, yet if it should be deemed in law responsible for the failure of said car to go beyond Texline, on said night of Sept. 27, 1891, or for the failure of plaintiff to enjoy said state room as far as said railway track was unobstructed, defendant says that in the presence of the dangers and perils of said journey caused by said washing out of said bridge of said railway company, an overruling necessity therefor existed, and defendant says that said stopping at Texline was made instead of continuing said journey to the margin of said broken bridge, because said Texline was the nearest place thereto where passengers could get any accommodations of food and shelter, there being no such provision for the public at said bridge; wherefore, it says, it was expedient that said car should be delayed at said town instead of said bridge, for the time until the emergency was provided for, and its occupants could go forward on their journey; and defendant says that whatever inconvenience and privations plaintiff suffered were caused by said accident, and the failure of said railway company to draw said car to Fort Worth; that defendant, through its agents, did all it could to ameliorate the condition of plaintiff and provide for her comfort, and so soon as it was able to provide her the accomodations contracted for, it provided the same for her use on the remainder of the said journey; all of which it is ready to verify, and it prays judgment that it go hence with costs.

PERCY ROBERTS,
WALTON, HILL & WALTON,
Attorneys for Defendant, The Pullman Palace Car Company.

2224 Law. Mary D. Maddox et al. vs. Pullman Pal. Car. Co. Defendant's 1st Amended Original Answer. Filed Feby. 13, '93, B. G. Duval, Clerk, by D. H. Hart, D'y.

Agreement to Consolidate.

Mary D. Maddox et al.	}	In the United States Circuit
vs.		Court, at Austin,
Pullman Palace Car Company.	}	Western District of Texas.

Laura P. Duval
vs.
Pullman Palace Car Company. } Law side.

Counsel for the parties to the above styled suit agree as follows:

1st. That said causes may be tried together, and that in case the Court permit same to go to the jury, there shall be submitted to the jury the question of what amount, if any, the respective plaintiffs may be entitled to recover; the jury to determine, under instructions from the Court, the amount of said sum, if any, so found in favor of the plaintiffs, to be apportioned by the jury between the plaintiffs.

2nd. That separate judgments may then be rendered and entered up in favor of the respective plaintiffs, and against the defendant, for the respective amounts, if any, so found by the jury, or for the defendants, as the cases may be decided.

WEST & COCHRAN,
Att'ys for Plaintiffs in both cases.
PERCY ROBERTS, &
WALTON, HILL & WALTON.

Nos. 2224 & 2225. Mary D. Maddox & Laura P. Duval vs. Pullman Palace Car Company. Agreement. Filed Feby. 13, '93, B. G. Duval, Clerk, by D. H. Hart, D'y.

Judgments. February 15, 1893.

Laura P. Duval
No. 2225. *vs.*
Pullman Palace Car Company. }

And now on this, the 13th day of February, A. D. 1893, this cause came on to be heard, and thereupon came the plaintiff, Laura P. Duval, by Mess. West & Cochran, her attorneys, and the defendant, the Pullman Palace Car Company, by Percy Roberts, Esq., and Walton, Hill & Walton, its attorneys, and thereupon came on to be heard plaintiff's motion to remand this cause to the State Court from which it was removed, and thereupon plaintiff in open Court withdrew her said motion and thereupon leave was given to defendant to file

its first amended original answer, which being done, plaintiff moved to strike out said answer, which motion, having been heard and considered by the Court, was overruled, to which ruling plaintiff in open Court excepted, and then came on to be heard defendant's general demurrer and special exceptions to plaintiff's petition, which, having been heard, and considered, were each by the Court overruled, to which ruling the defendant in open Court excepted, and thereupon both parties announced themselves ready for trial, and thereupon came a jury of twelve good and lawful men of the Western District of Texas, to-wit: T. N. Bryson and eleven others, who having been selected, empanneled and sworn according to law, heard the pleadings of both parties, and the evidence adduced from day to day until the 15th day of February, 1893, when, upon motion of defendant, the Court instructed the jury to return a verdict for the defendant, and thereupon said jury returned into open Court its verdict, as follows:

"We, the jury, find for the defendant. T. N. Bryson, Foreman."

It is therefore ordered and adjudged that the said plaintiff, Laura P. Duval, take nothing by this suit, and that the defendant, the Pullman Palace Car Company, have and recover of and from the plaintiff all its costs in this behalf expended, for which let execution issue.

Mary D. Maddox et ux.
2224. *vs.*
Pullman Palace Car Company.

And now on this, the 13th day of February, A. D. 1893, this cause came on to be heard and thereupon came the plaintiffs, Mary D. Maddox and her husband, John W. Maddox, by Mess. West & Cochran, their attorneys, and the defendant, the Pullman Palace Car Company, by Percy Roberts and Walton, Hill & Walton, its attorneys, and thereupon came on to be heard plaintiffs' motion to remand this cause to the State Court from which it was removed, and thereupon plaintiffs in open Court withdrew their said motion, and thereupon leave was given to defendant to file its first amended original answer, which being done, plain-

tiffs moved to strike out said answer, which motion, having been heard and considered by the Court, was overruled, to which ruling plaintiffs in open Court excepted, and then came on to be heard defendant's general demurrer and special exceptions to plaintiffs' petition, which, having been heard and considered, were each by the court overruled, to which ruling the defendant in open Court excepted, and thereupon both parties announced themselves ready for trial, and thereupon came a jury of twelve good and lawful men of the Western District of Texas, to-wit: T. N. Bryson and eleven others, who having been selected, empanneled, and sworn according to law, heard the pleadings of both parties, and the evidence adduced from day to day until the 15th day of February, 1893, when upon motion of defendant the Court instructed the jury to return a verdict for the defendant, and thereupon said jury returned into open Court its verdict as follows:

"We, the jury, find for the defendant. T. N. Bryson, Foreman."

It is therefore ordered and adjudged that the said plaintiffs, Mary D. Maddox and John W. Maddox, take nothing by this suit, and that the defendant, the Pullman Palace Car Company, do have and recover of and from the plaintiffs all its costs in this behalf expended, for which let execution issue.

Plaintiffs' Bill of Exception.

Laura P. Duval and Mary D. Maddox et al *vs.* The Pullman Palace Car Co.	In the Circuit Court of the United States, 5th Circuit, Western District of Texas, at Austin. Nos. 2224 and 2225, Consolidated and tried as one case.

Be it remembered, that on the trial of the above causes, consolidated and tried together as aforesaid, on the 13th, 14th, and 15th days of February, A. D. 1893, the following facts were proven, to-wit:

The plaintiff, Laura P. Duval, on September 27th, 1891, resided in Austin, Travis County, Texas. That her age at that time was 75 years, and that during the month preced-

ing, she had been on a visit to her daughter, the wife of Capt. Roberts, at Fort D. A. Russell, near Cheyenne, Wyoming. That her home was with her daughter and co-plaintiff, Mary D. Maddox, in Austin, Texas.

That while visiting her daughter, Mrs. Roberts, she received a painful and permanent injury in a carriage accident, from which she was a sufferer and in a helpless condition, and unable to walk on said September 27th, 1891.

That her daughter and co-plaintiff, Mrs. Mary D. Maddox, upon receiving intelligence of the injury to her mother, left her home in Austin, Texas, and went to wait upon and assist in conveying her mother home.

That while at Ft. D. A. Russell, her little child, Fannie, who accompanied her, was taken sick with a fever, and was in a delicate condition on the said September 27th, 1891.

That on September 26th, 1891, the said Capt. Roberts accompanied plaintiffs and the little child, Fannie, from Ft. Russell to Denver, and having previously arranged for sleeping car accommodations, on the evening of the 26th of September, on their arrival at Denver, went to the agent of defendant company and inquired if the state room on defendant company's car, to leave Denver, en route to Ft. Worth, on the next day, had been reserved for plaintiffs, as arranged for by him. That the said Capt. Roberts then and there pointed out plaintiff Duval to said agent, calling his attention to her condition, and that she was helpless and unable to walk; she then being in an invalid's wheel-chair, in charge of the hotel porter; and that it was the purpose of plaintiffs to leave Denver on the following morning for their home, and that it was necessary for them to have the accommodation of the drawing room in the Pullman car, because of the helpless condition of plaintiff Duval, and the delicate condition of the child, Fannie, and that they could not travel in an ordinary railroad passenger coach, and would not attempt the journey without the accommodations of a Pullman drawing-room.

That the said Capt. Roberts then and there offered to pay for the said drawing-room from Denver to Ft. Worth, but that the agent of defendant company asked him to wait until the next morning, because he would have to

change the date of his stamp if he sold the ticket that evening, and that the drawing-room in the car of the defendant company leaving Denver on the following morning for Fort Worth would be reserved for plaintiffs, and that he could call and pay for the same, and have ample time to do so, on the morning of the 27th of September, 1891.

That, in accordance with the request of defendant's agent, the plaintiffs, in charge of the said Capt. Roberts, repaired to the hotel in Denver and remained over night, and came back on the following morning to the union depot, at which defendant's said agent kept his office, and having already purchased and provided themselves with railroad tickets of first-class entitling them to be transported as passengers on the Union Pacific Railroad, from Denver to Ft. Worth. On the said morning of the 27th of September, 1891, the said Capt. Roberts, acting as agent in behalf of plaintiffs, again applied to defendant said agent, and engaged the drawing-room in the car "Ysadora," then attached to the said Union Pacific train, about to start on the journey from Denver to Ft. Worth.

That the said Capt. Roberts, so acting for plaintiffs, paid the defendant said agent the amount charged by him for said drawing room, to-wit: the sum of $20.00, which sum was then and there contributed and paid jointly and equally by plaintiff Duval and plaintiff Maddox.

That the said agent delivered to them the ticket of defendant company, and upon which were the following words: "Good for this date and car only when accompanied by first-class railroad ticket from Denver to Fort Worth in the drawing room of the car Ysadora. Price $20.00." Upon the back of which was the stamp of said agent, giving the date of September 27th, 1891.

That after so purchasing and receiving said ticket, the said Capt. Roberts delivered the same to plaintiffs; and assisted them in getting into the said car, and into the said drawing-room, together with the child Fannie, and their traveling equipments, consisting of a lunch basket, in which was provided food suitable to the condition of plaintiff Duval and of the child Fannie, in sufficient quantity to last them while on their journey from Denver to Ft. Worth by the usual course of train.

That in due time the said train left Denver and traveled during the day of the 27th, and that no notice was communicated to the plaintiffs that there was trouble ahead that would cause a delay and detention of the train, until about dark of the said day, after passing Trinidad, Colo., a short distance, when for the first time, notice was communicated to plaintiffs by the porter on said car "Ysadora." He informed them that there was a washout on the Canadian River that would necessitate a transfer from the said car "Ysadora" to the train on the opposite side of the river.

That as soon as plaintiffs were informed of this they became nervous and excited because of their helpless condition, because they were traveling unattended by any friend or relative, and sent for the conductor, who assured them that they would not reach the Canadian River until about daylight of the following morning, that for them to go to bed and have a comfortable night's sleep, and that he in person would provide for their comfortable and safe transfer at the river to the other train without serious inconvenience or discomfort. That, being thus reassured, plaintiffs undressed and went to bed, believing that the said car would be carried on to the Canadian River, and that they would enjoy the comforts of the drawing-room during the night, and that full provision would be made for their safety and comfort in making the transfer around the said washout.

That about one hour after they had so retired for the night, the porter of the defendant, employed with and working on said car, opened the door of the drawing-room and informed plaintiffs that they must get up and leave the drawing-room because the said car "Ysadora" would not go beyond Texline, a station a short distance ahead, and would there be turned back to Denver.

That, in accordance with the directions of said porter, who was then and there acting by direction of the conductor of defendant in charge of said car, they arose and dressed themselves preparatory to leaving the said car; and upon reaching Texline, about 12 o'clock on the night of the said 27th of Sept., the said train, including the car "Ysadora," was stopped by direction of the

railroad conductor in charge and the entire train was turned back to Denver.

That the plaintiffs were compelled to vacate the said drawing room and were compelled to go to a small hotel and there remain until the night following, the 28th of September, 1891. That the room provided for them at the said hotel was small and uncomfortable, having only one bed in it, and that too narrow to comfortably provide for plaintiffs and the little child Fannie, and requiring that in order to rest they should lie across the said bed; by reason of which, because of the injury of plaintiff Duval, she suffered much pain and was unable to sleep, and did not sleep at all during the night, and that the plaintiff Maddox, by reason of the uncomfortable bed and the excitement and worry of the transfer from the drawing room, was also unable to sleep during the night; and that in making the transfer from the car to the hotel, plaintiff Duval was subjected to the humiliation of being carried in the arms of the colored porter unattended by the conductor of the car.

That after remaining at the said hotel in Texline, a small station in a sparsely settled region, where the food provided was such as not to be at all suited to the delicate condition of plaintiff Duval or the child Fannie, and of which they did not partake. They remained there until about the hour of 12 o'clock on the night of the 28th of September, 1891, when the next train from Denver arrived at Texline. And plaintiff Maddox, who had received from the conductor of the car Ysadora of the previous train a transfer check entitling her and her companions to the use of the drawing room on defendant's car next passing over the road from Texline to Ft. Worth, applied to the conductor of defendant in charge of its car on the night of the 28th, for the use of the drawing room, and exhibited to him the said transfer check, and informed him of the necessity of herself and companions having the use of the drawing room in order that they might comfortably proceed on their journey, when they were informed by the said conductor that there was no drawing room on his car, and the only accommodations which he could provide for them was one upper berth, all others being occupied. That plaintiff Maddox informed him of the crippled and feeble condition

of her mother, and that it was necessary for her to have the drawing room or a lower berth. That the said conductor replied that he could not help her mother's infirmity, and that he had nothing but the upper berth—that she must take that or go into the ordinary coach. That after being so refused admittance to defendant's car, plaintiffs went into the ordinary railroad passenger coach.

That plaintiff Maddox found for her mother a vacant seat, and a gentleman courteously tendered her another seat, and that after putting her mother into the seat she placed her child Fannie into the seat tendered her, giving to each a full seat, in order that they might rest as best they could during the night; and plaintiff Maddox, finding no other seat, went into the negro compartment of the car, and there obtained a seat in company with the colored passengers, and rode therein, and remained therein from that time, 12 o'clock, until they reached the Canadian River on the following morning at about 7 o'clock.

That plaintiff Duval and plaintiff Maddox, because of the uncomfortable and cramped position in which they were compelled to ride, were unable to sleep, and did not sleep during the night, and were thus without sleep during the nights of the 27th and 28th of September, 1891.

That after reaching the Canadian River, they remained in the car until about 9 o'clock, when they were transferred over a rough country to a wagon bridge some miles below, and around to the train in waiting for them, bound for Ft. Worth.

That the said conductor and porter in charge of the car on the night of the 28th, did not undertake to provide for plaintiffs in any way, and that while traveling in the ordinary railroad coach they did so unattended, and with no greater comfort than ordinary passengers of the railroad.

That on the said car on which they sought passage on the night of the 28th, there was what is commonly known as a smoking room, in which there was a sofa, which could have been made into a lower berth, in length sufficient to provide a comfortable resting place for a passenger, and, in addition, a comfortable double seat, which part of the car is not sold by the defendant company, but is reserved as a smoking room for gentleman passengers, and as a place

for the conductor and porter to sleep. That it was in that end of the car in which was situated the gentlemen's toilet and wash room, but that the said smoking room was separated from the same by a curtain across the door, which would have obscured the view between these apartments of the car.

That the said conductor did not tender the said smoking room to plaintiffs, although the same would have been much more comfortable than an upper berth or the seats in an ordinary day coach. It being shown by witnesses for the defendant that this part of the car was never sold for the use of passengers, but was reserved, as before stated, as a smoking room, and as a sleeping room for the conductor and porter.

It was also shown that the said conductor and porter in charge of said car had been off duty for two or more nights preceding, and that this was their first night out on the road, and that the journey from Denver to Ft. Worth would have occupied two days and this one night.

That while being so transferred from the said train around the wash-out, plaintiffs were compelled to cross the county wagon bridge, out of which a span had been washed away, and across which gap a scantling had been swung with ropes to guard passengers from falling into the river, and that plaintiffs were compelled to cross this improvised gap in the bridge with great risk to their lives and with much anxiety and excitement upon their part as to their safety. And that after being so transferred to the train in waiting on the other side of the river, upon exhibiting to defendant's conductor, in charge of its car attached to that train, the said transfer check, issued to them by the conductor of the "Ysadora," he assisted them into the drawing-room, and after providing them with nourishment, caused the berths in the drawing-room to be made down for them, in order that the plaintiffs and the said child, Fannie, might receive needed rest; and from this point they were allowed to occupy the said drawing-room and proceed on their journey comfortably to Ft. Worth.

It was proven on behalf of defendant company, that in carrying on its business with the public, it had no motive power to haul its cars, but that it made contracts with the railroad companies, by which it attached its cars to the railroad trains.

the use of such sleeping and parlor cars for the transportation of its passengers, bear the cost of maintaining the running gear and bodies of such cars, and such other parts thereof as are incidental to ordinary first-class passenger cars, and are not essential to a sleeping or parlor car, which cost is understood and agreed to amount to an average of three (3) cents per mile, and shall pay to the Pullman Company, in fulfilment of such obligation, said sum of three (3) cents per car per mile for every mile run by such sleeping and parlor cars, upon the road of the Railroad Company, or upon the roads of other railroad companies, by direction of the officers of the Railroad Company.

Section 2. That the Railroad Company shall haul without charge to the Pullman Company, such sleeping and parlor cars to and from repair shops, and to and from other points on the lines of railroad owned or controlled by it as may be necessary in order that such sleeping and parlor cars may be put in good order or repair, to be renewed or improved as required hereunder. No mileage shall be paid on the cars so hauled.

Section 3. That the Railroad Company shall furnish and apply to such sleeping and parlor cars all necessary lubricating material, and shall supply ice and water, fuel for heating, and oils, fluids or other proper materials for lighting; and shall wash and clean such cars; and shall replace bellcords and couplings, and air-brake hose and couplings, as often as necessary.

Section 4. That the Railroad Company shall pay to the Pullman Company the cost of repairing and making good all damages to any of its sleeping or parlor cars, resulting from accident or casualty on the lines of its roads, and on any other roads upon which any such cars may be run, by direction of the Railroad Company, except damages resulting from accident or casualty arising from defective heating or lighting apparatus, or from the actual negligence of the employees of the Pullman Company in the line of their employment.

Section 5. That the Railroad Company shall promptly make all such repairs as may be necessary to put any of such sleeping or parlor cars in good repair whenever requested by the Pullman Company so to do; and shall, without request, make such repairs

as may be required at any time to insure the safety of such cars, and, when the Pullman Company is, by the terms hereof, under obligation to make such repairs, shall, at the end of each month, render to the Pullman Company bills therefor, charging the actual cost of material and labor expended on such repairs, with an addition of ten per cent to cover general expenses.

Section 7. That the Railroad Company shall require its ticket agents, at such offices as may be designated by the Pullman Company, to sell tickets for seats and berths in such sleeping and parlor cars, without charge to the Pullman Company; the proceeds of such sale to be at the risk of the Pullman Company.

Section 9. That the Railroad Company shall do all things herein required of it, at its own expense, and free of charge to the Pullman Company, except as otherwise herein specifically provided.

Article III.

Section 1. That all settlements and payments for mileage and repairs shall be made between the parties hereto monthly.

Section 2. That whenever the revenue from the sale of seats and berths equals or exceeds an average of seventy-five hundred dollars ($7500.00) per car, per annum, upon the whole number of cars furnished under this contract, then, while such annual revenue shall continue, the Railroad Company shall not be required to pay mileage on such cars.

Section 3. That the Railroad Company shall have the right to co-operate with other railroad companies in forming through and continuous lines of sleeping and parlor car service; and that, if it should become necessary for the Railroad Company so to co-operate with other railroad companies using sleeping and parlor cars not owned by the Pullman Company, the Pullman Company shall have the right to furnish its *pro rata* of sleeping and parlor cars, for service on such through or continuous lines based upon the mileage of the Railroad Company in said lines; and that in all cars operated on such through or continuous lines, the Pullman Company shall be entitled to receive all local fares for accommodations therein upon the roads of the Railroad Company, and its *pro rata* of through and intermediate fares based upon

And thereupon the defendant offered in evidence, after proving its execution, the following contract made by it with the several roads named in the body thereof, and whose names are signed thereto, as follows:

This agreement, made this first day of March, A. D. 1888, between the Pullman Palace Car Company, hereinafter called the Pullman Company, party of the one part, and the Ft. Worth & Denver City Railway Company, Denver, Texas & Fort Worth Railroad Company, and Denver, Texas & Gulf Railroad Company, hereinafter called the Railroad Company, party of the other part:

Whereas, the Pullman Company is engaged in manufacturing sleeping and parlor cars, and furnishing the same under contracts with the railroad companies for long terms of years; and has established and is maintaining an extensive system of sleeping and parlor car service, over the lines of connecting railroads extending throughout the United States, Canada and Mexico.

And, Whereas the Railroad Company is desirous of availing itself of the advantages afforded by the use of the cars of the Pullman Company, and the connections of its extensive system;

Now, Therefore, in consideration of the premises, and of the agreements hereinafter contained, the parties hereto agree as follows:

Article I.

Section 1. That the Pullman Company shall furnish to the Railroad Company sleeping and parlor cars for the transportation of passengers sufficient to meet the requirements of travel over the lines of railroads now owned or controlled by it, and from time to time hereafter, such additional sleeping and parlor cars properly equipped and acceptable to the Railroad Company, as may be needed to meet the requirements of travel over the roads now or hereafter owned or controlled by it.

Section 2. That the Pullman Company remaining the owner of all the sleeping and parlor cars furnished hereunder, and maintaining the same, except as herein provided, shall retain the right to collect such fares for the use of seats and berths therein by the railroad passengers occupying the same as are

customary on competing lines of railroad where equal sleeping and parlor car accommodations are furnished; agreeing that no more room in said sleeping or parlor cars shall be let to any person or persons than is usually granted to passengers by railroad companies which use their own sleeping or parlor cars, unless by the assent of the proper officer of the Railroad Company.

Section 3. That the Pullman Company shall furnish with each of such sleeping and parlor cars, one or more employes—as may be necessary—whose duties shall be to collect fares for the accommodations furnished, and generally to wait upon and provide for the comfort of passengers therein; such employes at all times to be subject to the rules of the Railroad Company governing its own employes.

Section 4. That the Pullman Company, except as hereinafter provided, shall keep all such sleeping and parlor cars in good repair, and shall renew and improve the same so far as may be necessary to keep them up to the average standard of the best sleeping and parlor cars generally in use on the lines of the trunk line railroad companies in the United States.

Section 6. That the Pullman Company shall place its tickets for seats and berths on sale in such of the railroad ticket offices as it may consider necessary for the convenience and accommodation of passengers.

Section 8. That the Pullman Company shall do all things required of it hereunder at its own expense and free of charge to the Railroad Company, except as otherwise herein specifically provided.

Article II.

Section 1. That the Railroad Company shall haul such sleeping and parlor cars of the Pullman Company furnished hereunder as may at any time be necessary in operating the lines of railroad now or hereafter owned or controlled by it; and shall use such cars as a part of all passenger trains controlled, in whole or in part, by it, where sleeping and parlor cars are required, in such manner as shall best accommodate passenger travel.

That the Railroad Company shall also, in consideration of

the proportionate mileage of the road or roads covered by the contract in such through or continuous lines.

Section 4. That the Railroad Company shall have the option to determine whether it will provide one-half or less proportion of all the capital required for furnishing the equipment which may be put upon the road of the Railroad Company under this contract, and upon the payment of the same to the Pullman Company, become a joint owner with the Pullman Company in the said equipment, and receive thereupon one-half or less proportion, as the case may be, of all the gains or profits, and bear the same proportion of all the losses arising from the business of operating the said cars furnished under this contract; the Pullman Company to retain the control and management; provided that such option shall be exercised, if at all, and notice thereof communicated to the Pullman Company, in writing, within five years from March 1st, 1888.

For the purpose of the option hereinbefore last provided, it is hereby mutually agreed, that the cars now furnished under this contract, together with such additional cars and equipments as may be subsequently assigned to and accepted by the Railroad Company, shall, when the Railroad Company notifies the Pullman Company of its intention to become part owner of said cars and equipments, be appraised by impartial and competent persons, one to be appointed by the Railroad Company and one by the Pullman Company, they two, in case of disagreement, to appoint a third, and the decision of the two to be final; and the value fixed by them shall be taken as the value on which the Railroad Company shall pay the one-half or less proportion, as the case may be, in purchasing its interest in the cars and equipments in the event of exercising such option.

And in the event of the Railroad Company exercising its option to become a part owner of said cars and equipments, it is hereby mutually agreed, for the purpose of ascertaining the profits to be divided between the Pullman Company and the Railroad Company under this contract, that the operating expenses, which shall be held to include maintenance of said car equipments, repairs, supplies, and all expenses of administration and

superintendence, and all expenses resulting from, or in any way connected with the operation of said cars, including judgments or payments for injury to passengers or loss of their property, for which the Pullman Company, as managers, may be responsible, shall be deducted from the gross receipts, and the remainder thereof shall be divided in proportion to ownership of such cars and equipments; settlements to be made monthly.

Section 5. That if any of the Pullman Company's employes, furnished with any of its sleeping or parlor cars operated under this agreement be injured or killed in consequence of a railroad accident or casualty, when serving in line of his duties, the Railroad Company shall save harmless the Pullman Company from damages, costs and expenses growing out of or incident to such injury or death, to the extent that the Railroad Company will be liable if such employe were in fact an employe of the Railroad Company when so injured or killed.

Section 6. That if either of the parties hereto shall fail to clean or repair, according to its obligations under this agreement, any of such sleeping or parlor cars, and shall, after written notice from the party of the neglect complained of, further neglect or refuse to clean or repair such sleeping or parlor cars within a reasonable time, such other party shall have the right to clean such cars, and to make, or cause to be made, all necessary repairs or renewals thereof, and shall at the next monthly settlement between the parties, be repaid the cost of such portion of the cleaning or repairs as the party in fault is liable for by the terms of this contract.

Section 7. That if either of the parties hereto shall fail to keep or perform any of the agreements of such party hereunder, and shall continue in default for sixty (60) days after written notice of such failure from the other party, then such other party shall have the right to declare this agreement terminated, at such time as shall be specified, by written notice of its intention to terminate the same.

Section 8. That this agreement shall be construed liberally, so as to secure to each party hereto all the rights, privileges and benefits herein provided or manifestly intended, and that if

any difference between the parties hereto shall arise under or in respect to this agreement, then, after written notice from one party to the other of the existence of the difference, with a statement of the question or questions on which a decision is desired, the same, with any question which the other party may propose for decision, shall be submitted to arbitration, as follows:

(Details omitted.)

Section 9. That for the purpose of this agreement, the Pullman Company shall be regarded as one party and the Railroad Company as the other party.

Section 10. That the Pullman Company shall have the exclusive right, for a term of fifteen years from the date hereof, to furnish the sleeping and parlor cars for the use of the Railroad Company on all its passenger trains, over its entire lines of railroad, and over all roads which it now controls or may hereafter control, by ownership, lease, or otherwise; and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars; and that the Railroad Company shall not contract with any other person or corporation to run any parlor or sleeping cars on or over any of said lines of road during said period of fifteen years.

Section 11. That this agreement shall remain in force for the full term of fifteen (15) years from the date hereof; that is to say, for the term commencing on the first day of March, A. D. 1888, and ending on the first day of March, A. D. 1903 unless the same shall be sooner terminated by virtue of the provisions of Section 7 in this article, or by the mutual agreement of the parties heacto.

In Witness Whereof, the parties hereto have signed, sealed and delivered these presents, the day and year first herein written.

PULLMAN'S PALACE CAR COMPANY,

[L. S.] by GEO. M. PULLMAN, *President.*

Attest: A. S. WEINSHEIMER, *Secretary.*

THE DENVER, TEXAS & FT. WORTH R. R. CO.,

[L. S.] by SIDNEY DILLON, *President.*

Attest: J. T. GRANGER, *Ass't Sec'ty.*

THE DENVER, TEXAS & GULF R. R. CO.,
[L. S.] by JOHN EVANS, *its President.*
Attest: CHARLES WHEELER, *Secretary.*
THE FORT WORTH & DENVER CITY RY. CO.,
[L. S.] by MORGAN JONES, *President.*
Attest: W. A. ROSS, *Secretary.*

It was then proven that the railroad from Denver to Ft. Worth, over which plaintiffs had contracts for transportation, was the same at the date of said contracts above owned by the several railroad companies whose names are signed thereto. And that, on the 27th and 28th of September, 1891, the same was under lease to, and being operated by the Union Pacific Railroad Company as a part of its general system; and that on the train of the 27th of September, 1891, the said car "Ysadora" was attached to a train being operated by the said Union Pacific Railroad Company.

And it was then and there proven, over the objections of plaintiff, that the railroad conductor in charge of said train, acting under orders from his superior railroad officers, ordered, directed and required that the said car "Ysadora" should be turned back with the said railroad train at Texline, and that all passengers should be put off at Texline. The sleeping car conductor protested against this and sought to get the orders countermanded. And that plaintiffs were, by the direction of the said railroad conductor, required to vacate the said drawing room.

To the introduction of which testimony plaintiffs objected, because:

(1) Their contract with the defendant company was to occupy the drawing room of the car "Ysadora," or an equally comfortable compartment of a similar car while they were on their journey, and by continuous passage from Denver to Fort Worth.

(2) That they had no notice or knowledge of the relations between the defendant company and the railroad company, and were not bound by the same, and that it was the defendant's duty and obligation to them, if the railroad company would not haul its car Ysadora, to cause the same to be detached, and to

remain at Texline until the arrival of the next train en route to Ft. Worth.

All of which objections were overruled by the Court, and to which plaintiffs reserve their exceptions by counsel in open Court, and now pray that this their bill of exceptions may be allowed and sealed by the Court, which is accordingly done.

T. S. MAXEY, *Judge.*

2. And thereupon it was further proven, over objections of plaintiffs, by the witness J. M. Smith, who was the district superintendent of defendant company at Denver during the month of September, 1891, that he was familiar with the relations existing between the Pullman Company and the different railroad companies in the United States. And that it was within the contractual rights and relations of the said companies in substance as follows:

"That a person who contracts with the Pullman company must first have made a contract with the railroad company for transportation. The Pullman company sells a passenger a ticket for the occupancy of a seat, berth or drawing room in the sleeping car leased by the railroad company. The Pullman cars which are run on the roads are leased from the Pullman company and are not owned by the railroad companies. The railroad company controls the cars that are leased to it by the Pullman company. The Pullman company has no means or agency for moving or hauling its sleepers. These means belong to the railroad company. The railroad companies who have leased the sleepers have the right to decide how many sleepers and what sleepers shall be attached to any train and has the right to say what particular person shall ride in the sleeper. The porter and conductor on the Pullman car are under the control of the railroad company. The Pullman company cannot prevent the railroad company from sending out or sending back any particular sleeper. The Pullman company does not receive any part of the transportation charges paid by the passenger. That the rules and regulations above were in operation on the 26th, 27th and 28th days of September, 1891, and that he was the principal officer of defendant company at Denver at that time."

Witness stated that his duties were the general supervision of defendant company's business at Denver.

All of the foregoing testimony of the witness, Smith, was admitted over objections by plaintiffs, upon the grounds given in the preceding bill, and because the said printed contract, admitted in evidence and herein copied, spoke for itself the rights, duties and relations of the defendant company and the said railroad companies, and could not be varied, contradicted, or its terms explained or enlarged upon, by this witness, and that defendant was bound by the terms of the said contract in evidence, and its duties to plaintiffs must be determined thereby; all of which objections were overruled by the Court. To which ruling and the admission of said evidence plaintiffs then and there, in open Court, reserved their exceptions, and now here tender this their bill, and ask that the same may be sealed, which is accordingly done. T. S. MAXEY, *Judge*.

3. And thereupon plaintiffs, without waiving their said exception, proved by said witness on cross-examination, as follows:

That the price of the sleeping car ticket goes to the Pullman company, and that the ticket which the passenger receives is the contract with the Pullman company. That the Pullman company employ and pay the conductors and porters in charge of its cars and discharge them without notice to or consultation with the railroad company. That the rules and regulations testified to by him were verbal and were issued by the General Superintendent of the Pullman Company. That he, witness, did not know of any place or any manner in which these rules, or the contract in evidence, are published or made known to the public. That there is no particular privacy about them, and that he was unable to state whether passengers had any means of knowing of these rules or not. That the said printed contract in evidence applied to the said railroad from Denver to Fort Worth, and that it existed prior to the time when the Union Pacific took charge of it, but that the same was assumed and recognized by the said Union Pacific company and by the Pullman company the same as it was when the said railroad was being operated prior to the control and operation by the said Union Pacific company. Said witness further stated that the Pullman com-

pany did not lease any particular car to the railroad company, but had cars that were in general circulation, and that a car would travel on its journey over several different lines of railroad, and that the sleeping car system over the road from Denver to Fort Worth extended to New Orleans. The car would, after reaching Fort Worth, be detached from the said Union Pacific train and be attached to a Texas Pacific train, and continue its journey.

It was further proven by this witness that there was a contract similar in its terms to the printed contract herein copied, existing between the Pullman Company and the Union Pacific Railway Company, covering all roads being operated by said railway company.

Plaintiffs then introduced (over objection of defendant because not the act of declaration of defendant), after proving its execution by P. J. Lawless, the ticket agent of the railroads centering at Austin, Texas, what said witness stated was a folder or advertising circular and map issued by the Union Pacific Railway Company and generally distributed by it through the ticket agents of the different railroads of the country for information to its passengers, and as a means of inducing travel over its roads, upon which it appeared that the road from Denver to Fort Worth during the month of September, 1891, was advertised in said folder to be a part of the Union Pacific system and as being operated by it. This fact was therein shown by a map of the Union Pacific Railway system, which included the line from Texline to Fort Worth, the heavy line showing their line and its connections with cities and other lines of road.

Under the head of "Important Information," on page 27 of the folder, the following appears in display type: "PULLMAN SLEEPING CARS," "Pullman's Palace Car Company now operates this class of service on the Union Pacific system." Then follows the rate of charges headed by the words "Pullman Palace Car rates between," followed by a list of places and amounts. Following the above "Private hotel, dining, hunting and sleeping cars of the Pullman Company will accommodate from 12 to 18 persons, allowing a full bed to each, and are fitted with such modern conveniences as private, observation and smoking rooms,

folding beds, reclining chairs, buffets, and kitchens. They are just the thing for tourists, theatrical companies, sportsmen, and private parties. These cars can be chartered at the following rates per diem, the time being reckoned from the time of departure until return of same, unless otherwise arranged with the Pullman Company."

Upon the foregoing evidence the defendant moved the Court to grant a peremptory instruction directing the jury to return a general verdict for defendant company.

And plaintiffs submitted the following charges, and insisted before the Court that the same should be given, viz:

Mary D. Maddox et al. *vs.* Pullman Palace Car Co. and Laura P. Duval *vs.* The Pullman Palace Car Co.	In Circuit Court of the United States for the Western District of Texas. At Austin, February Term, 1893. Consolidated for the purpose of trial as one suit.

The plaintiffs ask the Court to charge the jury:

That if you find from the evidence, that plaintiffs bought from defendant company on September 27th, 1891, at Denver, Colorado, and received from it its ticket entitling them to occupy the drawing room of its car "Isadora" then attached to a railway train upon which plaintiffs had right of transportation as passengers for hire from Denver, Colorado, to Fort Worth, Texas, and that such ticket issued to plaintiff by defendant company entitled them to occupy the drawing room in said car from Denver to Fort Worth, then the Court instructs you that it was the duty of defendant company to permit plaintiffs to occupy said drawing room in said car or to provide one of equal comfort and accommodations while plaintiffs were en route from Denver to Fort Worth.

And if the jury find from the evidence that said car Isadora was stopped at Texline, while en route, and was turned back and plaintiffs were required by the servants of defendant company to vacate said drawing room and leave the said car at about the hour of 11 o'clock p. m. on the night of September 27th, 1891; and were not provided by defendant with like accommodations in a

similar car, until the morning of September 29th, 1891, and were compelled to take accommodations at a hotel at Texline, and remain there until the following night, until the arrival of the first train going toward Fort Worth, and were on said train refused admission to or suitable accommodation in the sleeping car of defendant company by its servants in charge of such car, so attached to said train of the 28th of September, and were, in consequence, compelled to take passage in the ordinary day coach of said train; then you are instructed that the plaintiffs are entitled to recover from the defendant company their damages, if any, sustained by reason of the facts so found, and in estimating plaintiffs' damage, the Court gives you the following instructions as to the proper measure of damages:

1st. Plaintiffs are entitled to recover from defendant by way of rebate on the price paid for the ticket, in proportion as the distance from Texline to the Canadian river bears to the entire distance from Denver to Fort Worth.

2nd. That plaintiffs are entitled to recover against defendant damages for the physical pain and suffering and anguish of mind suffered by them by reason of being compelled to give up the said drawing room and take other accommodations, if less comfortable, from the time they left the defendant's car, at Texline, to the time the transfer began at the Canadian river. And you will look to the evidence and determine whether the accommodations which plaintiffs were compelled to take after leaving the car Isadora, and until they reached the Canadian river and began the transfer, were less comfortable than would have been afforded to them by remaining in the drawing-room of the car Isadora had it been left at Texline, instead of being taken back, and been permitted to continue their journey therein on the following night, and remained therein until the said transfer began. And you will assess plaintiffs' damage, if you find damage, at such sum as you may deem fair and reasonable compensation to each for the physical pain and suffering and mental anguish sustained by them respectively, if any, and you will, in your verdict, find such separate sum for each plaintiff severally as you may think each entitled to. On this point, you are instructed not to allow plaintiffs damages for any pain or suffering of body or

anguish of mind by reason of delay of the train, or any other discomfort occasioned to the general passengers on the train in the ordinary day coaches thereof. And you are instructed that you are limited to the time when the transfer began of the plaintiffs beyond the Canadian river, and must not take into account any pain or suffering of body or anguish of mind occurring while en route from the train beyond the river to the bridge, or on account of the peril incident to crossing the same.

WEST & COCHRAN,
Atty's for Plaintiffs.

Mary D. Maddox et al. & Laura P. Duval
vs.
Pullman Palace Car Co.

In Circuit Court of the United States for the Western District, Court at Austin. February Term, 1893. Consolidated for the purposes of trial as one suit.

The plaintiffs ask the Court to charge the jury:

That if the evidence shows, that the defendant company was under contract with the railroad company, to whose train the car Isadora was attached, by which the defendant company had not the right to control its movements, and had not the power to detach its said car at Texline, on the night of September 27th, 1891, so that the same might remain at said place until the arrival of the next train going in the direction of Fort Worth, and that in obedience to the orders of the railroad company, said car Isadora was stopped and turned back at Texline, and plaintiffs ejected therefrom, by the agents and servants of defendant company in charge of said car, acting under orders from the railroad company, you are instructed that in so doing, the said defendant company, its agents, and servants, in law, were, and in fact acted as, the servants of the railroad company, and as such would be equally liable with the railroad company for the wrong done plaintiffs, and can not defend in this suit, on the ground that, in so doing, this defendant company, its agents, and servants, acted by the order and direction of the railroad company.

And you are further instructed that plaintiffs have the right to recover from the defendant company as a joint wrong doer with the railroad company for injuries received, if any, by being

ejected from the said car and being deprived of the comforts and conveniences of said car, from said time and until the time when plaintiffs began the transfer at the Canadian river. And in estimating plaintiffs' damage, you will be governed by the instructions in chief asked plaintiffs.

WEST & COCHRAN,
Attys. for Plaintiffs.

Mary D. Maddox et al.
vs.
The Pullman Palace Car Co.
and
Laura P. Duval
vs.
Pullman Palace Car Co.

In Circuit Court of the United States for the Western District of Texas. At Austin. February Term, 1893. Consolidated for the purpose of trial as one suit.

The plaintiffs ask the Court to instruct the jury that the uncontroverted evidence is:

1st. That the Union Pacific Railway Company, by its map-folders distributed for the information of the public, represented: (1) that the railway over which the plaintiffs had transportation from Denver to Fort Worth, was a part of the Union Pacific Railway System; (2), that the Pullman Palace Car Company then operated the Pullman Palace cars on the Union Pacific system.

2nd. That the Pullman Palace Car Company represented to the public and to plaintiffs, that it owned, operated and controlled the Pullman Palace car "Isadora;" said representation being made by all words and letters painted on said car, by the uniform worn by the conductor and porter on said car, by the uniform worn by the agent of the Pullman Palace Car Co. at Denver, who sold the ticket to plaintiff for the drawing-room on said car, by the tickets sold to plaintiffs, and by the contract printed thereon, and by the receipt of the purchase money therefor.

And if the jury find from the evidence, that the Pullman Palace Car Company had a contract with the Union Pacific Railway Company, by which it parted with all control of the movements of its said Pullman Palace cars and particularly of its said car Isadora, then plaintiffs ask the Court to instruct the jury, that

there is no evidence that shows that the traveling public or plaintiffs had knowledge of the existence of such contract; and that said contract be not considered by the jury as a defence on the part of defendant Pullman Palace Car Company.

WEST & COCHRAN,
Att'ys for Plaintiffs.

The above and foregoing instructions are refused, on the ground that, in the judgment of the court, the material and controlling facts about which there was no conflict in the testimony, show that defendant discharged the legal obligations which it owed plaintiffs, and therefore incurred no liability to respond in damages to the plaintiffs. T. S. MAXEY, *Judge.*

And after full argument by counsel for plaintiffs and defendant, the Court gave to the jury its peremptory instruction to return a verdict in the case for defendant company, to which ruling and action of the court, plaintiffs then and there in open court by their counsel excepted, and now here ask that this their bill thereto be sealed by the Court, which is accordingly done.

T. S. MAXEY, *Judge.*

4. And the Court having refused to submit the case to the jury, on its own charge, defining the rights and duties of the parties under the law and the evidence, and having refused to give the said special charges asked by plaintiffs, and having instructed the jury to return their verdict against plaintiffs, which was accordingly done and judgment thereon rendered against plaintiffs, thereupon the plaintiffs by their counsel in open court reserved their exception to the action of the Court; and now here tender this, their bill thereto, and pray that the same be sealed as a part of the record in this case, which is accordingly done. T. S. MAXEY, *Judge.*

The foregoing several bills of exception are here agreed to, this March 20th, 1893, within the time allowed by the Court.

JOHN W. MADDOX and
WEST & COCHRAN,
Att'ys for Plaintiffs.
WALTON, HILL & WALTON,
Att'ys for Def't.

Nos. 2224 & 2225. Laura P. Duval and Mrs. Mary D. Maddox et al. vs. The Pullman Palace Car Co. Plaintiff's Bill of Exception. Filed March 21st, 1893. B. G. Duval, Clerk, by D. H. Hart, D'y.

Plaintiff's Motion for a New Trial.

Mary D. Maddox et al. and Laura P. Duval *vs.* Pullman Palace Car Co.	In Circuit Court of the United States for the Western District of Texas. At Austin. February Term, A. D. 1893. Consolidated as one suit.

Now come the plaintiffs in the above styled suits and move the Court to set aside the verdict of the jury and grant them a new trial in this cause, upon the following grounds:

1st. The Court erred in granting defendant a peremptory instruction, instructing the jury to return a verdict for defendant company, because, under the law and evidence, plaintiffs were entitled to full instructions generally to the jury, defining the rights of the plaintiff and the duty of defendant, under the contract declared upon and established by the evidence, and leaving the decision of the case upon the facts to the jury, as to whether plaintiffs were entitled to recover.

2d. The Court should have submitted to the jury the reasonableness of defendant's conduct in refusing to plaintiff the accommodations of the sofa and berth in its smoking room of its car, attached to the train upon which they rode, on the night of September 28th, from Texline to the Canadian River. And this upon the view of the law entertained by the Court, that defendant was not liable because of plaintiffs' ejectment from the car Isadora and its return to Denver by direction and command of the railway company.

3d. Because the Court erred in refusing plaintiffs' charge in chief, the same being a correct exposition of the law, as applicable to the facts under the contract rights of plaintiffs, and defendant's legal liability for the breach thereof, together with a correct rule as to the damages which plaintiffs were entitled to recover.

4th. And because defendant company, in sections 1 and 4 of Art. 1 of its contract with the railway company, agreed to furnish sleeping and parlor cars, properly equipped, to meet the requirements of travel, improved up to the average of the best sleeping and palace cars in use on trunk line railroads in the United States, and because it did not so do, on the train leaving Denver on the morning of the 28th of September, 1891; in this, that said defendant company did not furnish the said railway company on said day a car having state-room accommodations, which was "*needed to meet the requirements of travel;*" and which defendant company had contracted to furnish plaintiffs; and because such car was not furnished to said railway company on said morning of September 28th, 1891, and because it is not shown by the evidence that said railway company refused to take such car attached to its train on said 28th September, 1891, the Court especially erred in this, that it did not instruct the jury as asked by plaintiffs as follows: "And if the jury find from the evidence that the car Isadora was stopped at Texline, while en route, and was turned back and plaintiffs were required by the servants of the defendant company to vacate said drawing room and leave the said car at about the hour of 11 o'clock P. M. on the night of September 27th, 1891, and were not provided by defendant with like accommodations in a similar car until the morning of September 29th, 1891, and were compelled to take accommodations at a hotel Texline and remain there until the following night, until the arrival of the first train going towards Fort Worth, and were on said train refused admission to or suitable accommodations in a sleeping car of defendant company, by its servants in charge of such car so attached to said train of the 28th September, and were, in consequence, compelled to take passage in the ordinary day coach of said train, then you are instructed that plaintiffs are entitled to recover from defendant company their damages if any sustained by reason of the facts so found.

5th. The Court erred in refusing defendant's first special charge to the effect that defendant company, if compelled to obey the orders of the railway company in ejecting plaintiffs from its said car because of the relations existing between the

railway company and the defendant, would nevertheless by so doing become the servant of the railway company in the doing of a wrong, which it could not justify by reason of the order of its master. And that plaintiffs could recover against defendant as the joint *tort feasor* without suing the railway company.

6th. The Court erred in refusing plaintiffs' second special charge instructing the jury that if the relations existing between the railway company and the defendant were such that, in making contracts, the defendant did not have the right to control its cars, but was subject to the orders of the railway company, then that without notice to plaintiffs of the existence of such relations, plaintiffs had the right to believe that defendant contracted with them as an independent contractor, and that they, in the absence of notice, had, under their contract with the defendant, the right to remain in the car Isadora or to be furnished with equal accommodations in a similar car while being transported from Denver to Ft. Worth, under their contract of carriage with the railway company.

7th. The Court should have, in any event, instructed the jury that plaintiffs were entitled to recover by way of rebate upon the price of the ticket paid, in proportion as the accommodations furnished were to those contracted for.

8th. Because under the law and the facts proven, the Court, instead of instructing the jury peremptorily for the defendant, should have instructed them to find a verdict for plaintiffs for the amount of damage sustained by them by reason of the breach of contract made between plaintiffs and defendant, the execution of which and the breach thereof being established by the uncontroverted evidence, and defendant having wholly failed to establish any legal justification for such breach.

WEST & COCHRAN,

Attys. for Pl'ffs.

Endorsed: Mary D. Maddox & Laura P. Duval vs. Pullman Palace Car Co. Plaintiffs' Motion for a new Trial. Filed February 17, 1893. B. G. Duval, Clerk, by D. H. Hart, Dy.

Judgment Overruling Motion for New Trial, March 8th, 1893.

No. 2224. Laura P. Duval vs. Pullman Palace Car Company.

No. 2225. Mary D. Maddox et ux. vs. Pullman Palace Car Company.

And now on this the 8th day of March, 1893, came on to be heard the plaintiffs' motion for a new trial, and thereupon came the plaintiffs by Mess. West & Cochran, their attorneys, and the defendant by Walton, Hill, Walton, its attorneys, and the Court having heard said motion together with argument of counsel thereon, considers that the law is for the defendant, and it is adjudged that said motion be, and the same is overruled, to which ruling the plaintiffs in open Court excepted, and it is further ordered on the application that plaintiffs be allowed until the 25th instant (Mch. 25, 1893), in which to prepare and present to the Court their bills of exceptions.

Petition for Writ of Error.

United States of America, Western District of Texas, in the United States Circuit Court at Austin, Texas.

Laura P. Duval and Mrs. Mary D. Maddox et al. *vs.* Pullman Palace Car Company.	Nos. Law. Consolidated and tried as one suit.

To the Honorable the Justices of the Circuit Court of Appeals for the Fifth Circuit:

And now comes the plaintiffs in the above numbered and entitled cause, to-wit: Mrs. Laura P. Duval, a *feme sole*, and Mrs. Mary D. Maddox and her husband, John W. Maddox, by West and Cochran and John W. Maddox, their attorneys of record, and complain that in the record and proceedings, and also in the rendition of judgment in a suit between said parties as plaintiffs herein, and the Pullman Palace Car Company as party defendant, tried in the said Circuit Court of the United States of America, for the said Western District of Texas, holding sessions at Austin, at the February term thereof, in 1893, and in which a judgment was rendered in favor of the defendant above named on the 15th day of February, A. D. 1893, manifest

error hath intervened, to the great damage of the said plaintiffs, Laura P. Duval and others, the aforementioned plaintiffs in this cause:

Wherefore, doth the said plaintiffs herein, Laura P. Duval and others, pray for the allowance of a writ of error, and such other process as may cause the same to be corrected by the United States Circuit Court of Appeals for the Fifth Circuit.

WEST & COCHRAN.

Attorneys for the Plaintiffs in error, Laura Duval and others.

Granted this 18th July, A. D. 1893.

T. S. MAXEY, *Judge.*

Endorsed: Laura P. Duval & Mary D. Maddox et al. vs. The Pullman Palace Car Company. Petition for Writ of Error. Filed July 18th, 1893. D. H. Hart, Clerk.

Bond for Writ of Error.

The United States of America, Western District of Texas. In U. S. Circuit Court at Austin, Texas.

Mrs. Laura P. Duval and Mrs. Mary D. Maddox et al. *vs.* The Pullman Palace Car Co.	Law. Nos. Consolidated and tried as one suit.

Suit pending on the law side of the Circuit Court of the United States from the Western District of Texas, Austin Division.

Know all men by these presents, that we, Mrs. Laura P. Duval, a *feme sole*, Mrs. D. Maddox and her husband John W. Maddox, as principals, and Frank Hamilton and J. M. Day, as sureties, are held and firmly bound unto the Pullman Palace Car Company, a corporation, a citizen under its charter of the State of Illinois, in the penal sum of Five hundred dollars, to be paid to the Pullman Palace Car Company. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this the 18th day of July, A. D. 1893.

Whereas, the above named Laura P. Duval, Mary D. Mad-

dox and her husband John W. Maddox, obligors in the foregoing bond, as principals therein, have prosecuted a writ of Error to the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the judgment rendered in the said above entitled action, consolidated and tried as one suit, in the United States Circuit Court in and for the Western District of Texas, sitting at Austin, Texas, and rendered at the February term, 1893, of the said Circuit Court.

Now, therefore, the condition of this obligation is such that if the above named Laura P. Duval and Mary D. Maddox and her husband John W. Maddox, shall prosecute their said writ of error to effect, and answer all costs, if they shall fail to make good their said plea, then this obligation shall be void; otherwise to remain in full force and virtue.

LAURA P. DUVAL,
by WEST & COCHRAN, *her Attorneys.*
MARY D. MADDOX,
by WEST & COCHRAN, *her Attorneys.*
JOHN W. MADDOX,
by WEST & COCHRAN, *his Attorneys.*
FRANK HAMILTON.
J. M. DAY.

Endorsed: Laura P. Duval & Mary D. Maddox et al. vs. The Pullman Palace Car Company. Bond for Writ of Error. Filed July 18, 1893. D. H. Hart, Clerk.

Laura P. Duval and Mary D. Maddox et al.	In the Circuit Court of the United States, 5th Circuit, Western District of Texas, at Austin.
vs.	
The Pullman Palace Car Co.	

Now come the plaintiffs in the above entitled cause and submit the following assignment of errors committed upon the trial, and upon which they seek a reversal of said causes, viz:

1st. The defendant having proved that in carrying on its business it had no motive power to haul its cars, but made contracts with the railroad companies, by which it attached its cars to the railroad trains, and having read in

evidence the written contracts between it and the different railroad companies owning the line of road extending from Denver via Texline to Ft. Worth, under and by virtue of which its cars were attached to the Union Pacific trains en route from Denver to Fort Worth on the 27th and 28th days of September, 1891, the Court erred in admitting as evidence that the railroad conductor in charge of the train of September 27th, 1891, acting under orders from his superior railroad officers, ordered, directed and required that defendant's car Ysadora, attached to said train and in which plaintiffs were riding, should be turned back with the train at Texline, and that the agents of defendants in compelling plaintiffs to vacate said car acted by the order of the said railroad conductor, which evidence was admitted over plaintiffs' objection and exceptions reserved as shown by their first bill.

2nd. The Court having admitted in evidence the written contract between defendant and the said railroad companies, as stated in the preceding assignment, by which the rights and relations of defendant with the railroad and the public became a matter of law to be determined by the Court in the construction of the contract, erred in permitting the witness, J. M. Smith, defendant's District Superintendent at Denver, in Sept. 1891, to testify in substance that he was familiar with the relations existing between the Pullman Company and the different railroad companies in the United States, and that under the rules and regulations existing between the Pullman Company and the railroads generally during the said month, the Pullman Company leased its cars to the railroad companies. That the railway companies controlled the Pullman cars and its agents and servants in charge of them. That the railway companies had the right to decide how many and what sleepers should be attached to any train, and who should ride in them. And that the Pullman Company could not prevent the railway company from sending out or sending back any particular sleeper. All of which was admitted over plaintiffs' objections and exceptions reserved as shown by their second bill.

3rd. The Court erred in granting a peremptory instruction to the jury to return a verdict for defendant, because

under the legal evidence admitted, the Court should have submitted the case to the jury instructing them that the uncontroverted evidence showed that plaintiffs had made a contract with defendant to occupy the drawing room of the car "Ysadora" while on their journey as passengers from Denver to Fort Worth, and that they were entitled to the comforts of the drawing room of the said car, or equally comfortable accommodations on a similar car while they were being transported to their destination, and because deprived thereof they were entitled to recover their damage. A charge to this effect was requested by plaintiffs (No. 1 in the chief) and refused, and exceptions reserved as shown in their third bill.

4th. The Court erred in granting said peremptory instruction, because the evidence disclosed no reason other than the command of the railroad officers, why the car Ysadora was not detached from the train of Sept. 27th at Texline, and permitted to remain there until the arrival of the next train, and then attached thereto, and then proceeded on its journey. The Court should have charged the jury that the command of the railroad company would not justify defendant in breaking its contract with plaintiffs. That if defendant chose to obey the order of the railroad company, and was under contract so to do, that in so acting it was the servant of the railroad company, and was jointly and severally liable with it for the wrong done plaintiffs, notwithstanding the command, and that plaintiffs were entitled to recover their damage against defendant without joining the railroad company. A charge to this effect was presented by plaintiffs and refused, and exceptions taken as shown in their third bill.

5th. The Court erred in granting said peremptory instruction because there was no condition or limitation in plaintiffs' contract with defendants, that they would be permitted to occupy the drawing room of the car Ysadora, only so long as they would be permitted to remain therein by the railroad company, because the evidence shows that by circulars generally distributed for the information of its patrons, the Union Pacific Railroad Co. advertised and led the public to believe that the extra and peculiar accommo-

dations of sleeping and palace cars on its line was a distinct service being rendered, and to be obtained under separate contract with defendant, and because the defendant by no manner of advertisement gave plaintiffs or the public notice of any such condition or limitation in its contract or of its inability to perform the same, for these reasons the plaintiffs before the Court contended that defendant could not justify under the command of the railroad company, and a charge to this effect presented by plaintiffs and refused, and exceptions reserved as shown in their third bill.

6th. The Court erred in granting said peremptory instruction, and in failing to submit the case to the jury with instructions to find for plaintiffs their damages occasioned while being transported from Texline to the Canadian river on the night of the 28th of Sept., because by Section 1, Art. 1, of the written contract in evidence, the defendant company was at all times required to furnish to the railroad company sleeping and parlor cars for the transportation of passengers sufficient to meet the requirements of travel. And the defendants knowing that plaintiffs were at Texline and had a contract with it to occupy the drawing room of a car equal in accommodation to the car "Ysadora," failed to furnish or tender to the railroad company for the train of Sept. 28th, a car with a drawing-room, or to reserve for plaintiffs' use lower berths in the car which it did furnish, or any kind of accommodations therein which they could occupy, by reason of which failure, plaintiffs under the terms of said contract were entitled to recover their damage.

7th. The Court erred in granting said peremptory instruction, and in failing to submit to the jury, whether the conduct of defendant's conductor, in charge of its car on the night of Sept. 28th, in failing to tender to plaintiffs the use of the smoking room in his car was reasonable, and such treatment as a man of ordinary prudence in the management of his own like business would have given to plaintiffs under similar circumstances, and if the jury should find in the negative, then to find for plaintiffs their damage because of such misconduct and negligence on the part of said conductor.

Wherefore, plaintiffs pray that the judgments in this cause rendered against them should be reversed and the cause remanded.

WEST & COCHRAN,
Attys. for Plffs. in Error.

Endorsed: Laura P. Duval and Mary D. Maddox et al. vs. The Pullman Palace Car Company. Assignment of Errors. Filed July 18, 1893. D. H. Hart, Clerk.

Writ of Error.

United States of America, *ss.*
The President of the United States,

To the Honorable Judges of the Circuit Court of the United States, 5th Circuit, in and for the Western District of Texas, holding sessions at Austin in said District, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Circuit Court, before you, between Laura P. Duval and Mary D. Maddox and her husband John W. Maddox, who are plaintiffs, and the Pullman Palace Car Company, who is defendant, Nos. 2224 and 2225 on the Docket of said Circuit Court of the United States, sitting at Austin in said District, a manifest error hath happened, to the great damage of the said Laura P. Duval, Mary D. Maddox and John W. Maddox, who are plaintiffs in error herein, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Circuit Court of Appeals for the 5th Circuit of the United States, together with this writ, so that you have the same at New Orleans thirty days from this date in said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being inspected, the said Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 18th day of July, in the year of our Lord one thousand eight hundred and ninety-three, and seal our said Circuit Court at Austin, in the one hundred and eighteenth year of the Independence of the United States.

[SEAL]

D. H. HART,
Clerk of the Circuit Court of the United States, West. Dist. of Texas at Austin.

Allowed this the 18th day of July, A. D. 1893.

T. S. MAXEY, *Judge.*

Endorsed: In Supreme Court of the United States. Laura P. Duval, Mary D. Maddox et al., Plffs. in Error vs. The Pullman Palace Car Company, Defts. in Error. Writ of Error to Circuit Court of Appeals of the United States, 5th Circuit. Issued 18 day of July, A. D. 1893. D. H. Hart, Clerk.

Citation in Error.

United States of America.

To the Pullman Palace Car Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Circuit Court of Appeals for the Fifth Circuit of the United States, in the City of New Orleans, in the State of Louisiana, thirty days from this date, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Texas, 5th Circuit, sitting at Austin, wherein Laura P. Duval and Mary D. Maddox, and her husband, John W. Maddox, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgments in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 18th day of July, in the year of our Lord one thousand eight hundred and ninety-three.

Test with seal of said Circuit Court, at Austin, this the 18th day of July, A. D. 1893.

[SEAL]

(Signed) T. S. MAXEY, *Judge*.
D. H. HART, *Clerk*.

Endorsed: No. —. Laura P. Duval and Mary D. Maddox et al. vs. The Pullman Palace Car Company. Citation in Error. Issued July 18, 1893. H. D. Hart, Clerk.

Service of this writ accepted this July 18th, 1893. Walton, Hill & Walton, Attys. of Record for the Pullman Pal. Car Co. In U. S. C. C. W. D. of Texas.

Certificate.

The United States of America, }
Western District of Texas. }

I, D. H. Hart, Clerk of the Circuit Court of the United States in and for the Western District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the proceedings had in said Court in causes numbered 2224 and 2225 (consolidated), wherein Laura P. Duval and Mary D. Maddox and her husband John W. Maddox, are plaintiffs, and the Pullman Palace Car Company is defendant, as the same appears from the files and records of said Court, now in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Austin, in said District, on this, the 4th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL]

D. H. HART,
Clerk of said Court.

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[64] And afterwards, to-wit: on the 23rd day of January, A. D. 1894, the following proceedings were had in said United States Circuit Court of Appeals, to-wit:

Laura P. Duval et al }
vs. }
Pullman Palace Car Co. }

This cause came on to be heard this day, and after agument by

Mr. T. B. Cochran, for plaintiffs in error, and Mr. Percy Roberts, for defendant in error, was submitted to the court.

And afterwards, to-wit: on the 29th day of May, 1894, the same being a day of said November Term, 1893, of said United States Circuit Court of Appeals, the following proceedings were had in said cause, to-wit:

Laura P. Duval et al.
vs.
[65] Pullman Palace Car Co.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Texas, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed.

It is further adjudged that the plaintiffs in error, Laura P. Duval, Mary D. Maddox, and John W. Maddox, and the sureties on the writ of error bond herein, Frank Hamilton and J. M. Day, be condemned *in solido*, to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court.

And afterwards, to-wit: on the 16th day of June, 1894, a petition for rehearing was filed in said cause, in words and figures following, to-wit:

No. 180.

[66] In the United States Circuit Court of Appeals, Fifth District.

Laura P. Duval et al., Plaintiffs in Error,

vs.

Pullman Palace Car Company, Defendant in Error.

Petition for rehearing by plaintiffs in error.

West & Cochran and John W. Maddox for petitioners.

Now come your petitioners and pray the court to grant them a rehearing in this cause, for the following reasons:

I.

The court erred in not holding that defendant is liable to respond in damages to plaintiffs for failure to furnish them drawing room accommodations September 28th from Texline to the Canadian River; because, if as we contend, defendant had the right to select the car on that day, it is liable, because it *did not select* one similar to the Ysadora; and if, as the court holds, the carrier alone had the right to select, as was done on that day, a car without drawing-room accommodations, then defendant is liable because it voluntarily, by contract with the carrier, deprived itself of the right to select such car as would enable it to furnish plaintiffs drawing-room accommodations.

II.

The court erred in not holding that defendant is liable in damages to plaintiffs for failure to reserve for them two double lower berths in the car without stateroom accommodations attached to the carrier's train September 28th; because if as we believe defendant had such control of its cars internally as would enable it to do so, it was utter disregard of plaintiffs' helpless and crippled condition, and of their contract rights not to reserve them for plaintiffs, and permit them to continue their journey therein from Texline to the Canadian; and if defendant had parted with the internal control of its cars to the carrier, who might command defendant's agents and servants and compel them to sell all lower berths in said car to other persons who might desire to occupy them; then defendant is liable to plaintiffs, because it had voluntarily put itself, its cars and servants so completely and absolutely under the control of the carrier that it had no authority nor means of performing any contract for accommodations, no matter with whom made, or how aged, sick, maimed and helpless they might be.

III.

The court erred in holding that "the allegations of the complaint were not sustained by the evidence," for the

allegation that defendant is a common carrier is not the only allegation, nor does plaintiffs' right to recover depend upon the fact that defendant was or was not a common carrier. Plaintiffs procured transportation from the railroad; and complaint is made and fully sustained by the evidence, that defendant sold plaintiffs the right during the journey to occupy a drawing-room in one of its cars, and that they were deprived of such accommodations from Texline to the Canadian, either, as we contend, because defendant *would* not furnish them, or, as we understand the court to hold, because defendant had voluntarily, by contract with the carrier, deprived itself of all ability to do so.

IV.

The court erred in basing its decision on the mistaken theory that the only ground of complaint is, that plaintiffs were ejected and the car Ysadora turned back at Texline; for the vigor of plaintiffs' complaint is, that they were deprived of extra comfortable accommodations in a drawing-room, and of all accommodations in defendant's cars, from Texline to the Canadian river; and not because of an interrupted journey, nor by reason of any breach of the railway company's contract as a common carrier.

V.

The court erred in not holding defendant liable to plaintiffs in this case; because defendant, by contract with the carrier, deprived itself of the selection of its cars, and the control thereof internally as well as externally, and bound its servants and agents to obey the railroad company. So that by voluntary relinquishment to the carrier, defendant had no right, no authority, no cars, no servants, and no means of performing the contract with plaintiff, or any other contract which it might make.

VI.

The court erred in not holding defendant liable to plaintiffs in this cause; because defendant by its voluntary contract authorized the railroad company to command defendant's servants as

it did, and eject plaintiffs from the car Ysadora at Texline; and further because the carrier was not only authorized to eject plaintiffs at Texline, but also to eject them at Trinidad, or at any other place, even in the station at Denver, before plaintiffs began their journey.

VII.

The court erred in not holding that defendant is liable in damages to plaintiffs; because defendant's contract depriving itself of all right to contract, and of ability to perform, was voluntarily made without the knowledge of plaintiffs, and was by defendant concealed and hidden from them.

[Signed] WEST & COCHRAN,
JNO. W. MADDOX,
Attorneys for petitioners, Laura P. Duval et al.

We, the undersigned counsel for petitioners, hereby certify that, in our opinion, the foregoing petition is well founded in law and in fact, and that it is presented in good faith, and not interposed for delay.

[Signed] WEST & COCHRAN,
JNO. W. MADDOX,
Attorneys for petitioners, Laura P. Duval et al.

And afterwards, to-wit: on the 27th day of November, 1894,
[71] the following order was made and entered in said cause, to-wit:

Laura P. Duval et al.
vs.
Pullman Palace Car Co.

The petition of the plaintiffs in error for a rehearing of this cause, having now been fully considered by the Court,

It is ordered that the same be and is hereby refused.

OPINION.

[71] United States Circuit Court of Appeals, Fifth Circuit.
(Filed May 29, 1894.)

Laura P. Duval et al.,
Plaintiffs in Error,
vs.
Pullman Palace Car Company,
Defendant in Error.
} No. 180.

Error to the United States Circuit Court, Western District of Texas.

Before Pardee, Circuit Judge, and Toulmin, District Judge.

Toulmin, District Judge, delivered the opinion of the Court.

Laura P. Duval and Mary D. Maddox, joined by her husband John W. Maddox, brought their separate suits against the Pullman Palace Car Company in the District Court of Travis County, Texas, and upon petition of defendant in error the cases were removed to the United States Circuit Court for the Fifth Circuit and Western District of Texas, at Austin, where they were consolidated by agreement, and at the trial, upon a peremptory instruction from the court, the jury found for the defendant company, and judgment was entered accordingly.

The two cases arose out of the same state of facts, which briefly stated are as follows:

Plaintiff Duval, on September 27, 1891, was in Denver, in a crippled and helpless condition, unable to walk and suffering from an accident, and was then 75 years of age. Plaintiff Mary D. Maddox was her daughter, and was with her mother on the day named, and also with her little daughter just recovering from a spell of fever. The parties desired to return to their home in Austin, Texas, but would not attempt the journey unless they could procure the drawing room of one of defendant's sleeping cars, because of their suffering and helpless condition, and so informed defendant's agent at Denver, when and from whom they bought their tickets.

On the day named the plaintiffs together bought a ticket from defendant's agent at Denver, paying $20 therefor, which enti-

tled them to the exclusive use of the drawing room of defendant's car "Ysadora," then attached to a train of the Union Pacific Railway Company en route to Fort Worth, Texas, upon which train plaintiffs had purchased and held first class tickets, entitling them to transportation by the railroad company from Denver, Colorado, to Fort Worth, Texas. On the ticket procured from the defendant's agent were the following words: "Good for this date and car only, when accompanied by first class railroad ticket from Denver to Fort Worth, in the drawing room of the car 'Ysadora,'" which ticket was stamped on the back with the date of September 27, 1891.

The plaintiffs entered and were given possession of the drawing room of said car by the defendant's conductor and porter in charge, and rode therein to Texline, when at about 12 o'clock on the night of September 27, they were required by defendant's said conductor and porter to get up and dress and leave the said car and find accommodation at a small hotel in Texline, a small station in a sparsely settled region of country. At this hotel they were unable to get a comfortable bed or food, and were unable to sleep during the night or the day following, during which time plaintiff Duval suffered much pain from her injuries.

It was shown that the train was turned back at Texline by command of the Union Pacific Railroad officials, because of a washout at the Canadian river, about 100 miles further down the road, and that in turning plaintiffs out of the drawing room, defendant's conductor and porter were acting under orders from the train conductor.

On the night following, at about 12 o'clock, the next train from Denver arrived, and the passengers of the previous train were permitted to get on board, and as the plaintiffs held a transfer check issued to them by defendant's conductor in charge of the car "Ysadora" showing their right to complete their journey in the drawing room of the defendant's car attached to the next train, they applied to defendant's conductor in charge of the car attached, and were told by him that his car had no drawing room, and that he had but one berth unoccupied, which was an upper berth. In this car there was the gentlemen's smoking room, with accommodations for a bed for one, and a com-

fortable double seat, unoccupied save by the conductor and porter. This compartment was not tendered plaintiffs after notice to the conductor of their condition and claim, and they were compelled to enter the ordinary day coaches of the train and ride therein from 12 o'clock of the night of the 28th of September, until they reached the Canadian river at 7 o'clock next morning.

The defendant proved that in carrying on its business it had no motive power to haul its cars, but made contracts with the railroad companies by which it attached its cars to the railroad trains, and having read in evidence the written contract between it and the different railroad companies owning the line of road extending from Denver via Texline to Fort Worth, under and by virtue of which its cars were attached to the Union Pacific trains en route from Denver to Fort Worth, proved that the defendant's sleeping or drawing room car "Ysadora" was attached to the train of the said Union Pacific Railroad Company en route from Denver to Fort Worth on the 27th of September, 1891, and that the car was turned back from Texline by order of the railroad officers given to the train conductor, and by him to the conductor of the sleeping car.

The defendant also proved by its district superintendent that under its contract with the railroad companies the latter controlled the defendant's cars, and its agents and servants in charge of them, and that the railroad companies decided and directed how many and what sleeping cars should be attached to their trains.

This suit claims damages for a breach of contract. The complaint avers that the defendant was engaged in the business of carrying passengers as a common carrier for hire by means of railroad cars running between the cities of Denver, in the State of Colorado, and Fort Worth, in the State of Texas; that the plaintiff on the 27th of September, 1891, engaged passage and purchased tickets over the line of railway traversed by defendant's cars from Denver to Fort Worth. That defendant entered into a contract to convey them over said line of road comfortably and securely. That defendant, in violation of its contract with plaintiffs, and in violation of their rights and privileges in

the premises, refused to convey them beyond the town of Texline on said line of railroad between Denver and Fort Worth, and did so under such circumstances as to entitle the plaintiffs not only to actual but exemplary damages.

The proof shows that plaintiffs did not make any contract with defendant to convey them from Denver to Fort Worth, and it shows that the defendant was not engaged in the business of carrying passengers as a common carrier for hire between said cities. But it shows that plaintiffs on the day named purchased and held first-class tickets entitling them to transportation by the Union Pacific Railroad Company from Denver, Colorado, to Fort Worth, Texas, and that on the same day they procured from defendant a ticket good for the date and car in the drawing-room of defendant's car "Ysadora," which was part of the Union Pacific railroad train going from Denver to Fort Worth, on which plaintiffs were to be transported.

It shows that the train was turned back at Texline by command of the Union Pacific railroad officials, because of a washout further down the road, and that it was under the orders of the train conductor that the plaintiffs were turned out of the car "Ysadora," and against the objection or protest of the conductor of the car. The proof also shows that the defendant's said drawing room or sleeping car was operated by and was under the direction and control of the Union Pacific Railroad Company. The plaintiffs objected to the evidence introduced to show that the defendant's drawing-room or sleeping cars used by the said railroad company were operated and controlled by the railroad company and subject exclusively to its direction, and that this particular car was so operated and controlled, and also objected to the evidence that the railroad officials ordered the said car to be turned back and the plaintiffs to be put out at Texline. The trial court overruled the plaintiffs' said objections, to which they excepted, and now among other things assign the same as error. As we understand it, the purpose of the evidence objected to was to show the character and extent of the control of the movements and management of the defendant's car attached to the Union Pacific Railroad train and operated by the railroad company. It did not in any way alter or vary the written contract

in evidence, but in substance and effect was that the car "Ysadora" was controlled by the railroad company in its operation and movements under the said contract; in other words, it was to show what were the true relations existing between the defendant and the railroad company respecting the said car. We do not think the court erred in admitting this evidence. The only other assignment of error we consider it necessary to notice is that presented on the court's peremptory instruction to the jury to return a verdict for the defendant. The allegations of the complaint were not sustained by the evidence. The defendant company is not liable as a carrier. It made no contract to carry. The plaintiffs had paid their fare to the railroad company and were provided with first class tickets entitling them to be carried from Denver to Fort Worth by it. It was the duty of the railroad company to convey them over its line, and they were being carried by it. The defendant's sleeping car constituted a part of the carrier's train. The plaintiffs secured the privilege of riding in this car by paying an additional sum to the defendant. The obligation of the defendant under its contract with the plaintiffs was to accommodate them with the drawing-room in its car, constituting a part of the carrier's train, as long as the carrier would convey it. If the carrier refused to convey it beyond Texline and turned the car back to Denver, these were not the acts of the defendant company, and they would form no basis for complaint against it in this case. R. R. Co. vs. Roy, 102 U. S., 451.

Our opinion is that there was no error in the instruction given, and therefore none in the refusal to charge the jury as requested by the plaintiffs. Judgment affirmed.

United States Circuit Court of Appeals,
For the Fifth Circuit.

[79] I, James M. McKee, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 79 pages, numbered from 0 to 79, inclusive, contain a true copy of the record, pleas, process, proceedings, and all papers in the case of

Laura P. Duval et al., Plaintiffs in Error,

vs.

Pullman Palace Car Company, Defendant in Error,

No. 180, November Term, 1893, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United Stated Circuit Court of Appeals, at the City of New Orleans, this 6th day of May, A. D. 1895.

[SEAL]

JAMES M. McKEE,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

163 U.S. 684

Office Supreme Court U. S.
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OCT 16 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

163-684

OCTOBER TERM, 1895.

On the Petition of Laura P. Duval et al., asking for a Writ of *Certiorari* in the case of

LAURA P. DUVAL ET AL.

vs.

PULLMAN'S PALACE CAR COMPANY.

634

No. 180 of United States Circuit Court of Appeals for the Fifth Circuit.

Brief on Behalf of Pullman's Palace Car Company, in Opposition to the Application of Laura P. Duval et al.

PERCY ROBERTS,
For the Pullman Company.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

OCTOBER TERM, 1895.

On the petition of Laura P. Duval *et al.*, asking for a writ of *certiorari* in the case of

LAURA P. DUVAL ET AL.,

vs.

PULLMAN'S PALACE CAR COMPANY,

No. 180 of United States Circuit Court of Appeals for the Fifth Circuit.

Brief on behalf of Pullman's Palace Car Co. in opposition to the application of Laura P. Duval et al.

PERCY ROBERTS,
For the Pullman Company.

It is respectfully submitted that the application for the *certiorari* in this case should be denied:

First, because the decision of the Court of Appeals sought to be reviewed is well founded; and

Second, because the case is not one in which, under the rulings of this court, a *certiorari* is allowable.

Statement of Facts.

The determinative facts of this case, as disclosed by the evidence, are as follows:

At 8 o'clock A. M. September 27th, 1890, the plaintiffs, Mrs. Duval and Mrs. Maddox, accompanied by the little daughter of Mrs. Maddox, purchased at Denver, Colorado, from E. C. Cunningham, a ticket agent of the Pullman Company at Denver, the use of the drawing-room in the sleeper "Ysidora," from Denver to Ft. Worth, Texas. The said sleeper was attached to a train on the Union Pacific and Fort Worth and Denver Railways, which left Denver, September 27th, 1890, at 8:35 A. M.

Mrs. Duval, the mother of Mrs. Maddox, was lame and her lame condition was pointed out to Mr. Cunningham when the Pullman ticket was bought from him.

The transit from Denver to Ft. Worth involved the crossing of the Canadian River at a place called Cheyenne, and the evidence showed that the railroad bridge over that river was washed away before the train reached Texline, and that no information as to the washing away of said bridge was in the possession of the agents or officers of the Pullman Company when the Pullman tickets were sold to the plaintiff, and, as a matter of fact, was not known to any servant of the Pullman Company until the train was within a few hours of Texline, a station on the railroad.

The car "Ysidora" was cut off at Texline, and sent back to Denver exclusively by the order of the Railway Company, and by the act of the conductor of the Railway Company, in which order and act the Pullman Company did not participate. It further appears from the evidence that the fact that a washout had occurred, and in consequence thereof the "Ysidora" would be cut off and sent back to Denver, was communicated to the Pullman conductor by the train conductor, and that the train conductor ordered the Pullman

conductor to so inform his passengers, and to tell his passengers that they must leave the car at Texline, where there was a hotel, and where they could remain until the Canadian River could be passed.

The Pullman servant, acting under this command of the train conductor, gave to the passengers the notification ordered by the latter. The evidence was uncontradicted that the Pullman conductor protested against the cutting off and turning back of the sleeper, and sought, by every means in his power, to obtain a rescission of the order, so that the passengers on the Pullman car would not be disturbed. But his efforts were unavailing, and the order of the Railroad Company was carried into operation over his protest.

It was also shown by the uncontradicted testimony of the Pullman conductor and porter and by two passengers on the "Ysidora" at the time, viz., J. M. Kelly and R. C. Campbell, that before the plaintiff left the "Ysidora" at Texline, the Pullman conductor announced in a loud voice in the body of the sleeper, and in the vicinity of the plaintiffs, that any passenger who desired to remain on the sleeper could do so, and that as a matter of fact one or two of the passengers did remain on the sleeper, and were taken back to *Trinidad*, without any extra charge being made on that account.

The evidence further shows that the Pullman conductor used his best efforts to obtain as comfortable lodgings for the plaintiffs at the hotel at Texline as could be had; and that Mrs. Duval was carried by the porter of the Pullman Company, with the greatest care, to the hotel; the conductor of the Pullman Company not being permitted to leave the car while the porter was away.

It further appears in the evidence that the first passenger train going south which passed Texline with a Pullman car attached, was on the following night, the night of the 28th of September, 1890; that said Pullman car had no drawing-

room in it; that every berth in it had been taken, and was then in the occupation of other passengers, except one or two upper berths; that said upper berths were tendered to the plaintiffs, and declined by them; that the plaintiffs thereupon went into an ordinary passenger coach, and were transferred to Cheyenne near where the bridge over the Canadian River had been washed away; that the plaintiffs were carried by wagons from the point where the train stopped to the broken bridge, and were carried over the same by planks that traversed the space washed away; that on the south side of the river the plaintiffs were conveyed by carriages to where a train awaited them going south; that to the said train a Pullmun sleeper was attached having in it a drawing-room, and that the plaintiffs occupied said drawing-room, without complaint, until they reached the City of Fort Worth, their destination.

It further appears in evidence that there was in the sleeper which was attached to the train that passed Texline on the night of the 28th the ordinary smoking-room, which is never sold to passengers, but which is exclusively reserved as a sleeping place for the servants of the Pullman Company, and as a dressing room and smoking place for the passengers; and that, while this smoking-room was not tendered by the Pullman conductor to these plaintiffs, it was not asked for by them, nor was it refused to them by the conductor.

On the basis of the foregoing facts the plaintiffs brought suit, not against the Railway Company, but exclusively against the Pullman Company, and asked for a verdict in damages of $25,020 each.

ARGUMENT.

I.

Let us consider first the respective contracts made by the Railway Company and by the Pullman Company with passengers, and the respective obligations growing out of them.

The evidence in the case, and the unbroken line of authorities to which the attention of the Court will be hereinafter invited, show that in order to travel by railway on board a Pullman sleeper it is necessary for the passenger to enter into two separate contracts, with two different persons, and in regard to essentially different matters.

The initial contract is made with the Railway Company and is the contract of carriage or transportation.

The undertaking of that contract is to haul or transport the passenger, by a continuous transit, on one of its own cars, or on some car leased by it, and therefore used and controlled by it as one of its own cars, from the point of his departure to the point of his destination. The Railroad Company further stipulates with its passenger to give to the latter, while *in transitu*, the undisturbed occupation of a seat in one of its own cars, or of certain space in one of its leased Pullman cars bought by the passenger from the Pullman Company. In other words, the Railroad Company undertakes, by its contract with a first-class passenger who has bought space in one of its leased Pullman cars, to transport him to his destination in the special Pullman car in which the latter has purchased space.

See Case of Roy, 102 U. S., 451.

Among the many obligations imposed by this contract on the Railway Company, and the Railway Company alone, are the obligations of having a sufficient motive power, sufficient machinery, a sufficient equipment, the requisite number and

character of cars, the special car in which its passengers have bought space, and its entire road bed and bridges in such a condition as to admit of a continuous transit. Hence, if, on account of a breach of any one of those obligations, the continuous transit of the passenger is broken, or he is illegally deprived by the Railroad Company of the space bought by him, and injury thereby results to the passenger, the Railroad Company alone is liable in damages.

To that contract of transportation the Pullman Company is neither a party nor a privy. It does not share in the consideration inuring to the Railway Company from it, and it does not incur any of the obligations growing out of that contract.

After this contract of carriage has been made with the Railway Company, the passenger is qualified to contract with the Pullman Company, whose cars are leased by the Railway Company, and hence for the time being practically owned by the Railroad Company.

This second contract, made with the Pullman Company, is purely a contract of letting and hiring, by which the passenger hires the occupation of a certain berth or seat in a certain car from one point to another while he is being transported on that car by the Railway Company, and by which the Pullman Company stipulates to deliver the hired space to the passenger and to do, participate in or authorize no act which shall illegally disturb the passenger in his rightful use of the space.

The passenger also hires from the Pullman Company, in virtue of its contract with it, the services of a porter and conductor, and certain appliances of comfort, while he is being transported on that car by the Railroad Company.

When, therefore, it appears that the services of the porter and conductor, in the line of their duties, have been so rendered, and when it further appears that the space in the sleeper purchased by the passenger has been delivered to

him by the Company, and that it, the Pullman Company, has done nothing to deprive the passenger of the undisturbed use of that space, but has done all within its power to uphold and maintain that use, it is clear that all of the obligations of the Pullman Company incurred by its contract have been discharged.

And when we say this we merely state the law, as it has been declared in this country from the 73 Illinois down to the present time.

It has been so held by every Supreme Court of every State in the Union, and by every Circuit Court of the United States, that has passed on the question, and by the Supreme Court of the United States.

In order to show to your Honors how strongly and universally the doctrine of the Pullman liability, as I have stated it, is held by the Courts, I invite your attention to the various cases passing on that liability. And I invite the consideration of the Court not merely to cases decided in favor of the Pullman Co., but also to those decided against the Company. As to the doctrine of the liability of the Pullman Co., under its contract with passengers, your Honors will find, both in the cases for and in those against the Company, an absolute *consensus*. Let us take up first the cases against the Company.

The first of these is the leading case of Blum, reported in 1st Flippin, 500; the case of Gardiner, reported in 16th A. & E. Railroad Cases, 324; the Matthews case, 74 Texas, 655; the Diehl case, 84 Ind., 474; the Lewis case, 9 N. E. R., 615; the Sealing case, 24 Mo. App., 29; the Bevis case, 26 Mo. App., 19; the Pollock case, 69 Texas, 120; and the Nevins case, 106 Ill., 222.

The sole issue in the Nevins case was whether the Pullman Company, having vacant berths at its disposition, could refuse to sell one to a respectable person applying for it, who was the owner of a first-class railway ticket.

In that case the Court decided that the Pullman Company, having held itself out to the world as ready to sell berths to any respectable person holding a first-class railway ticket, was estopped to refuse to sell a berth to such a person.

While the decision in that case was against the Pullman Company, it rested purely on the doctrine of estoppel, and it will be found that the Court declared, in the course of its decision, by the clearest implications, that the Company was not a common carrier, although it had a public character, in virtue of which it incurred certain obligations to the traveling public.

In all of the foregoing cases, which were adverse to the Pullman Company, the doctrine of liability declared was that the Pullman Company was not bound either by the obligations a public carrier of passengers or of an innkeeper.

In the following cases the decisions were in favor of the Pullman Company:

The case of Smith, 73 Ill., 360; the case of Pardee, 19 Central Law Journal, 380; the case of Gaylord, decided by the Supreme Court of Kentucky, 26 American Law Register, 359, 366 and 512; the case of Tracey, decided by the City Court of New York, 67 Howard Practice Reports, 154; the case of Stearne, reported in 4 E. & A. Railroad Cases, page 443; the case of Carpenter, 3d Railroad Corporation Law Journal, 32; the case of Handy, 63 Mississippi, 609; the case of Delgado & Sims, decided by the United States Circuit Court in New Orleans; the case of Whitney, 9 N. E., 619; the case of Searles, 45 Federal Reporter, 330; the case of Roy, 102 U. S.; the case of Lawrence, 10 N. E. R., 723, and the case of Lemon, 52 Federal Reporter, 262.

From some of the foregoing cases I quote the following extracts which embody the proposition of law in which they all unite.

In the case of Chester Smith against the Pullman Company, 73 Ill., 360, the Court said:

"Pullman's Palace Car Company, appellant, is not liable as a carrier. It made no contract to carry. The appellant was being carried by the Railroad Company."

In the case of Lewis vs. Sleeping Car Company, 9 North Eastern Reporter, 615, the Supreme Court of Massachusetts state thus the status and scope of the liability of the Pullman Company:

"While such Sleeping Car Company is not liable as a common carrier, or as an inn-holder, yet it is its clear duty to use reasonable care to guard its passengers from theft."

Again, in the leading case of Whitney against the Pullman Company, the Supreme Court of Massachusetts passed on the question in hand in these conclusive terms:

"It is clear that the plaintiff cannot hold the defendant liable as a common carrier. She can only hold it liable upon the ground that her property was lost by some negligence of the defendant, and without any fault on her part" (9 North Eastern Reporter, 619).

In the case of Gaylord vs. the Pullman Company, the Supreme Court of Kentucky passed on the question in these terms:

"The Pullman Car Company is not a common carrier or an inn-keeper, or under a like liability" (26 American Law Register, pages 359, 366 and 512).

In the case of Handy, 63 Mississippi, 609, the Supreme Court of Mississippi state the doctrine thus:

"This obligation is not such as pertains to common carriers or inn-keepers, and such Companies do not occupy the relation of insurers against all losses under all circumstances."

In the case of Roy against the Pa. Railroad Company, 102 U. S., 451, the Supreme Court of the United States declare the doctrine thus:

"The undertaking of the Railroad Company was to carry the defendant in error over its line, in consideration of a certain sum, if he elected to ride in what is known as a 'first-class passenger car,' with the privi-

lege, nevertheless, expressly given in its published notices, of riding in a sleeping car constituting a part of the carrier's train, for an additional sum paid to the Company owning such."

Authorities might be multiplied indefinitely, but it seems sufficient to declare at this point of the argument, that the doctrine which now universally obtains is, that the contract of transportation is one which the passenger makes with the Railroad Company alone, the profits of which are not participated in, and the obligations of which are not assumed by the Pullman Car Company.

The two contracts made by the passenger with the Railway Company and the Pullman Company, respectively, which, as we have seen, are so radically discriminated from each other, give rise to certain characteristic obligations against the Railway Company and against the Pullman Company, respectively.

While the Railway Company is liable for injury to a passenger caused by the unlawful act of the Pullman servants (who, in favor of passengers, are deemed the servants also of the Railway Company), the Pullman Company is *not* liable for any of the obligations and duties contracted by the Railway Company under and by virtue of its contract of transportation (Williams Case, 40 Louisiana Annual, 417).

Bearing in mind these radical discriminations as between the respective contracts made by the passenger with the Railway Company and the Pullman Company, what do we find as practically applicable to this controversy?

We find that all of the obligations in favor of the passenger as to the continuity of his voyage, as to the uninterrupted character of that voyage, as to the character of the car and the uninterrupted occupation of the car in which he is being hauled by the Railroad Company, as to whether the railway track, or railway locomotives, or railway cross-ties, or railway bridges, were in such condition as to assure an unbroken transit, fall within the scope of the contract which the passenger makes with the Railway Company.

And since, as we have seen, the Pullman Company is not a party or privy to that contract, enters into no duty as to any of the obligations specific to that contract, it follows that no cause of action can arise against the Pullman Company in favor of these plaintiffs growing out of the violation of any one of these obligations by the Railroad Company.

II.

The second ground on which the plaintiffs rest their complaint is, that the sleeper "Ysidora" was arrested at Texline and turned back to Denver; in consequence of which they were compelled to surrender the occupation of the drawing-room they had purchased.

It is undoubtedly true that the sleeper was arrested at Texline and turned back to Denver; but whether the Pullman Company can be held on that account depends absolutely on whether the arrest and return of the sleeper were the acts of the Pullman Company, or in which it participated.

If they were the acts of the Pullman Company, they might constitute the basis of a complaint against that Company. But, if they were not the acts of the Pullman Company, it is equally clear that they cannot form the basis of a complaint against that Company.

In this connection the first thing to which we ask the attention of the Court is the contract between the Railway Company and the Pullman Company, and the full and exhaustive testimony of the Pullman Superintendent, Mr. Smith. By that contract and testimony, it appears that the control of the movement of the Pullman cars attached to the trains of the Railway Companies who have

leased those cars, is exclusively that of the Railway Companies; that they have the sole right to determine how many sleepers shall be attached to each of their trains; which one of the sleepers shall be attached to any particular train; how far the sleeper shall be permitted to go; who shall and who shall not travel on those sleepers; when a passenger may be ejected from a sleeper; and, generally, in what mode and manner the Pullman cars they have leased and pay a heavy rent for, shall be used and employed by them.

In this, and in all cases similar to this, the Pullman Company has been met by the chronic exception that neither its contract with the Railroad Companies, nor any other evidence tending to show the nature and extent of the control of the Railway Companies over the Pullman cars leased by them, was admissible in evidence. And in this, as in all other similar cases, the contract and other evidence have been admitted.

Among the many grounds on which the Courts have allowed the admission I advert to two. One is that where, as in the present case, the defendant has put at issue a formal allegation made in the plaintiff's petition, to the effect that it was a common carrier and had undertaken a contract of transportation with the plaintiff, the defendant had a right to introduce its contract with the Railroad Company, and any other evidence relevant to that issue, tending to uphold the denial of the defendant of the specific allegation of carriership made by the plaintiff.

The other, and conclusive ground, resting on common sense and in the interest of justice, may be stated thus: When, as in this case, the evidence is that two contracts have been made by the plaintiff, the first one with the Railroad Company, and the second with the Pullman Company, whose car is leased and used by the Railway Company as a part of its train engaged in the transportation of passengers, and

a controversy arises which turns on the question whether the Railway Company or the Pullman Company has made the contract of transportation with the plaintiff, and has the right to control the use and movements of the Pullman car leased by the Railway Company, evidence bearing on and determinative of those questions must, necessarily, be introduced, in order to enable the courts to intelligently adjudicate. In such cases, in the interest of justice, the Courts will, *ex mero motu*, require the production of such evidence. And this has been the ruling of all the Courts whenever the admissibility of such evidence has been put at issue.

But again. All of these determinative facts bearing on the extent of the use and control of the Pullman cars by the Railroad Companies who have leased them, are not only shown by the contract between the Pullman Company and the Railway Company, and by the testimony of Mr. Smith, but they equally appear, *a priori*, and will, therefore, be considered by the Court, being, as they are, necessarily involved in the contract of lease between the Pullman Company and the Railway Companies, and necessarily implied in the obvious public use and employment of the Pullman cars by the Railroad Companies. For it is manifest that if the Railway Companies, the lessees of the Pullman cars, who use and employ those cars in the conduct of their immense transportation business, did not control the use and movements of those cars; if, that is to say, the Pullman Company had power to say which of its cars leased by it to the Railway Companies should be attached to each particular train, and when, and where, and how far those cars should go, and what person should and should not be a passenger on these leased cars, in defiance of the will of the Railroad Companies who have leased them, and to whom, therefore, they practically belong, the contracts of lease made by the Railroad Companies, and their employment of these cars, would resolve themselves into mockeries.

The Pullman Company does not share in the control of the movement of its cars, or their use as vehicles of transportation. It is absolutely without authority to select which of its leased cars, and how many of those cars shall be attached to any one of the railway trains, any more than the lessor of a house has the right to control the lessee in the legitimate use of the house, and in the selection and choice of his guests. This exclusive power in a lessee, as to the use and movement of the thing leased by him, is an essential incident in every contract of lease; made so by law, and resting on common sense and reason, and, therefore, is a matter in respect of which no notice to third persons is necessary; of which, indeed, the courts take judicial cognizance.

If, therefore, in any given case, a passenger on a Pullman car attached to a particular train is deprived of the occupation of his drawing-room before he reaches the point of his destination, and this deprivation is caused by the exclusive acts of the Railroad Company, and it should happen that the next Pullman car attached to the next train sent out by the Railway Company should have no drawing-room in it to be tendered to the passenger, it is clear that the Pullman Company cannot be held for either of such deprivations. The passenger, because of such acts, may acquire a cause of action against the Railway Company, but absolutely none whatever against the Pullman Company.

"But," retort the plaintiffs, "you have leased your cars to the Railway Company, thereby investing the latter with dominion over them touching their selection, use, movement and occupancy. You have thereby clothed the Railroad Company not only with the power but the *right* to *illegally* disregard, set aside and ignore the contracts of occupancy made with us; and you have done this in virtue of a previous contract with the Railroad Company of which we had no knowledge express or implied."

The reply to this contention is obvious and would seem to be conclusive. The Pullman Company, by its contract with

the Railroad Company, invested the latter with no " right " to do wrong. It only clothed the Railway Company with such dominion over and such rights of use of its cars as every lessee has over the things leased, to wit, the right to use them *legally:* the right to use them, for example, in subjection to any rights of occupancy in the cars acquired by any third person under and in accordance with the contract of lease between the companies.

Hence, any action on the part of the Railway Company in violation of a right of occupancy in one of its leased Pullman cars, acquired by a person under the authority of the contract between the companies, is clearly *not* authorized by the use and control of its cars given by the Pullman Co. to the Railway Company by its contract of lease. Therefore it is that for any such violation of a right of occupancy in a Pullman car, committed by the Railroad Company leasing it, the Pullman Company can not be held. The Pullman Company can no more be held for this illegal use of its leased car than for any other illegal use of it by the Railroad Company. The latter having, in virtue of its lease, the *obvious, public* and absolute physical dominion of the Pullman cars leased by it, is clothed, of course, with the brutal power to use them in any illegal way they are susceptible of being used. But, clearly, it is only when the violation of a right of occupancy in a Pullman car or any other illegal use of such a car has been perpetrated by, or participated in, by the *Pullman* Company, that the latter may be pursued by the injured party.

III.

At this point I desire to say a few words touching the unique theory of liability which the learned counsel of the plaintiffs deduce from certain clauses in the contract between the Pullman Company and the Railway Company.

Let us consider it in detail.

1. They quote that clause in the contract between the Pullman Company and the Railway Company, which says:

> "That the Pullman Company shall furnish to the Railroad Company, sleeping and parlor cars for the transportation of passengers, sufficient to meet the requirements of travel."
>
> "2. That the Pullman Company shall renew and improve the same so far as may be necessary to keep them up to the average standard of the best sleeping and parlor cars generally in use on lines of the Trunk Line Railroad Companies in the United States."
>
> "3. That the Railroad Company shall haul such sleeping and parlor cars of the Pullman Company, furnished hereunder, as may, at any time, be necessary: and shall use such cars as a part of all passenger trains, in such manner as shall best accommodate passenger travel."

The argument of plaintiff's counsel, drawn from the foregoing clauses, is, that if the Pullman Company should fail to furnish sufficient cars to meet the requirements of travel; or should fail to renew or improve the same so as to keep up the cars to the average standard; or, if the Railroad Company should fail to haul as many sleepers as might be necessary, or should fail to use said sleepers in a manner that should best accommodate passenger travel, the Pullman Company shall be liable in damages to any third person who may complain that the Pullman Company has failed to carry out any of its clauses of agreement with the Railroad Company, or that the Railroad Company has failed to carry out its clauses of agreement with the Pullman Company.

The legal reply to such a contention is, that no person, not a party to the contract between the Pullman Company and the Railroad Company, can stand in judgment because of any infraction of that contract by either of the contractors.

If a clause of that contract is violated by one of its parties the other, of course, thereby acquires a right of action for any resulting damages.

But that any third person can acquire any right of action, except by subrogation from one of the parties, is a proposition so novel, and so obnoxious to first principles, that its best answer appears to be to state it.

The common sense reply to all of such contentions, founded on a rational construction of the contract, supplements and upholds the strictly legal conclusion.

When the Pullman Company undertakes by its contract with the Railway Company to furnish the latter with sleeping and parlor cars sufficient to meet the requirements of travel, it means, and can only mean, that the Pullman Company will furnish such number of sleepers to the Railroad Company as shall, in the judgment of the *Railroad* Company, be deemed sufficient to meet the requirements of travel on its line.

It is not for the Pullman Company to judge how many of its cars shall be leased and used by the Railroad Companies. That is the exclusive function of the Railway Company who has to pay the rent of these cars.

It would be a droll condition if the Pullman Company had a right to nominate the number of cars the Railway Company should lease from it, and compel the latter to receive that number; that it should have a right to decide for the Railroad Company what was the proper standard of its sleeping and parlor cars; and should have a right to decide for the Railroad Company how many of its sleepers were necessary to be hauled, and in what manner the Pullman cars should be used by the Railway Company, so as best to accommodate passenger travel on that road.

Railway Companies are not presumed to be insane, and yet it would amount to insanity to enslave themselves by such a stipulation, and be compelled to receive and pay for

as many sleeping cars as the *Pullman* Company should decide they required.

In the course of a somewhat extended experience in the defense of the Pullman Company, I have met with many startling propositions as to the law of its liability, but this is the first time that this double-headed proposition of liability has been tendered; to wit: that the Pullman Company was charged with the obligation of deciding how many of its cars and what special kind of cars the requirements of the travel of a particular Railway demanded; and that the Pullman Company could be held in damages by a third person, not a party to the contract, for a failure on its part to make a correct decision as to the number of cars the travel of a particular railway demanded, and what should be the *special structure* of those cars; whether, for example, *each* of the cars should have a drawing room in it, or that only a certain number of them should.

That no such obligations were incurred by the Pullman Company as the plaintiffs seek to deduce from its contract with the Railway Company, either in favor of the Railway Company, or of any third person not a party to that contract; but, on the contrary, that its real obligations, both as to the Railway Company and as to passsengers, are such as we have already explicitly declared, is a conclusion which rests not only on the plain intendment of the contract, on reason and principle, but also on an adamantine foundation of authority.

In proof of this I refer to the mass of decisions already cited, and from which I shall now submit such quotations as seem necessary to exhibit the settled law on this important question.

I quote first from the case of Delgado and Sims, in which Judge BILLINGS of the Circuit Court of the United States for the Louisiana District first formulated the accepted doctrine, and expressed the law of this case.

Judge BILLINGS, as the organ of the Court in that case, said:

"The Court construed the contract into which the defendants entered by the sale of the sleeping car tickets, as follows:

"That in the first place they obligated themselves to have throughout the entire line, as indicated upon their tickets, suitable cars to allow uninterrupted transit. Secondly, that they obligated themselves to have provided such connections between the railroads intervening between the termini and over the route indicated upon their tickets, as according to the regular trains running upon such roads would permit a continuous transit. Thirdly, that they obligated themselves that these roads were so situated, manned and run, as, according to their regular established trains, admitted of a continuous passage over the route specified in the tickets which were sold. Fourth, that they obligated themselves to furnish proper attendance upon such cars, and that they would stop with sufficient frequency and for a sufficient length of time, to allow passengers to take their meals.

"The Court further instructed the Jury, that, if defendants had shown that they performed these obligations; that they furnished suitable cars; that proper connections over the roads which were operated, so as from day to day have allowed according to their ordinary trains, a continuous passage, and that notwithstanding all this, one of the roads, to wit: the Baltimore & Ohio Road, refused or failed to send forward any train of cars from Washington to Philadelphia, on account of apprehensions of the riot, and that this refusal or failure was the result of no fault of the defendants, who had an adequate car in readiness to proceed, that in that case they had performed all the obligations they had undertaken so far as they were connected with the passage of the plaintiffs. The gist of these instructions was, that the contract on the part of the defendants was not one for transportation; that that was a distinct contract made between the plaintiffs and the various Railroads whose tickets of passage they had purchased; and that the obligation on the part of the defendants, though connected with the transportation of the plaintiffs, were only such as we have enumerated."

In the case of Lawrence vs. Pullman's Palace Car Company, 10 N. E., 723, the Supreme Court of Massachusetts state the law of the present suit in such conclusive terms, that I quote their opinion *in extenso*. The Court say:

"The gist of the plaintiff's claim is that he was wrongfully refused accommodation in the sleeping car of the defendant, in coming from Baltimore to New York, by the defendant's servant, and that, on declining to leave the car, he was ejected therefrom. His argument assumes that it was for the defendant to determine under what circumstances a passenger should be allowed to purchase a berth, and, incidentally, the other accommodations afforded by the sleeping car. An examination of the contract with the Pennsylvania Railroad Company,

by virtue of which the cars owned by the defendant were conveyed over its railroad, shows that, while the cars were to be furnished by the defendant corporation, they were furnished 'to be used by the railroad company' 'for the transportation of passengers;' that its employees were to be governed by the rules and regulations of the railroad company, such as it might adopt from time to time for the government of its own employees. While, therefore, the defendant company was to collect the fare for the accommodations furnished by their cars, keep them in proper order, and attend upon the passengers, it was for the railroad company to determine who should be entitled to enjoy the accommodations of these cars, and by what regulation this use of the cars should be governed. The defendant company could not, certainly, furnish a berth in its cars until the party requesting it had become entitled to transportation by the railroad company, as a passenger, and he must also be entitled to the transportation for such routes and distances, or under such circumstances, as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made.

"The railroad company had classified its trains, fixing the trains upon which persons should become entitled to transportation in the sleeping cars, and the cars in which such transportation would be afforded. It was their regulation that, between Baltimore and New York, this accommodation should only be furnished to those holding a ticket over the whole route. It does not appear that this was an unreasonable rule; but whether it was so or not, it was the regulation of the railroad company, and not of the defendant. The evidence was 'that ordinary train conductors of the Pennsylvania Railroad have full and entire authority over the porters and conductors of the Pullman cars, in regard to the matter of determining who shall ride in the cars, and under what circumstances, and in regard to every other thing except 'the details of care,' etc. The defendant's servant, the plaintiff having entered the sleeping car, informed him that his 'split' tickets, as they were termed, were not such as would entitle him to purchase a berth, and that he could sell only to those holding 'through tickets intact to the point to which sleeping accommodations were desired.' The plaintiff was in no way disturbed until the train conductor (who was not defendant's servant) came into the car, informed plaintiff that his tickets were not such as to entitle him to purchase the sleeping car tickets, and several times urged the plaintiff to leave the sleeping car, which the plaintiff refused to do. Whether accommodation was rightly refused to plaintiff or not, in the sleeping car, the refusal was the act of the railroad company's servant, and not of defendant's, whose duty it was to be guided by the train conductor.

"The ejection of plaintiff was also the act of the Railroad Company, and not of the defendant. It is the contention of plaintiff that, even if he might be ejected from the car, it was done in an improper manner. The plaintiff testified that he was waiting for a 'show of force,' after his repeated refusals to leave the car. This exhibition of force was made by the train conductor, who put his hand upon him, when the plaintiff arose, and yielded thereto. The Pullman conductor took hold of the

plaintiff's arm when he arose, and aided the plaintiff in passing along the aisle, and in crossing the platform of the cars; but the evidence does not show that he used or exercised any force whatever. Even if he had used force upon the plaintiff, he was not doing the business of the defendant Company; he was assisting the train conductor in the duty he was performing as servant of the railroad. To conduct him across from one car to another, in the manner described by plaintiff himself, after he had repeatedly refused to leave the car, affords no evidence of any removal in an improper manner. The act of defendant's servant was in every way calculated to assist plaintiff in his transit from one car to another. Nor is the fact that the car into which plaintiff was passed subsequently became cold important, even if it were possible to hold the defendant responsible for the act of its servant. So far as appears by the evidence, there is no reason to believe that, when plaintiff entered it, it was not in fit condition to receive passengers, and the management of it was entirely with the Railroad Company, and not with the defendant."

In the Paddock Case, 37 Federal Reporter, 841, Mr. Justice BREWER of the Supreme Court states the doctrine of the defendant's liability as follows:

"The first question is whether he (the plaintiff) was expelled, or whether he voluntarily left the train. That is a question of fact. The testimony you have heard, and nearly all of it to-day, so that it is fresh in your minds. It would be useless for me to repeat it, and the question of fact in that respect is: Did this plaintiff, when he got to Las Vegas, leave the train of his own volition, or was he put off? If he left of his own choice freely, he cannot recover in damages. If he was expelled—that is, if he was forcibly put off the train—then the question arises: *By whom was he expelled? Was he expelled by the officers or agents of the Railroad Company, or by the officers or agents of the Pullman Company? If he was expelled solely by the officers of the one Company, and the officers of the other Company had nothing to do with it, then that Company is not liable.*"

In the case of Lemon vs. Pullman Car Company, 52 Federal Reporter, 262, Judge HILL, as the organ of the United States Circuit Court, states the law as follows:

"This is an action for damages alleged to have been sustained by reason of the refusal of the defendant Car Company to sell the plaintiff a berth in their sleeping car from Chicago, Ill., to Jackson, Miss. The plaintiff also alleges that the agent of the defendant was very rough and rude to him. To these charges the defendant pleaded not guilty, which makes it incumbent upon the plaintiff to sustain the allegations contained in his declaration. Whether they have done that or not is for you to determine from the evidence. I will instruct you that the Pullman Palace Car Company is not a common carrier. *The Illinois Central Railroad is a common carrier, and receives, as a part of its train, the cars belonging to the Pullman Palace Car Company, the same forming part of its train, and being under its control, except so far as providing lodging in the Pullman*

Car for the accommodation of those who may pay for it. Its agents also have the right to determine who shall occupy the Pullman Car as part of its train. It is to keep and provide cars sufficient for the accommodation of its passengers. The providing of lodging for the passengers belongs alone to the Pullman Palace Car Company as a mere lodger.

"The charge here is that the agent of the Palace Car Company was also the agent of the Illinois Central Railroad Company, and sold sleeping car tickets as well as tickets for transportation. *It was the privilege of the Railroad Company, by its agents, to determine who should occupy seats on its trains, and that included the Pullman Car, and to determine whether a party had paid the proper amount, and was entitled to travel on the train to which it was attached.* Thus the agent was then in a dual capacity, as acting for the Railroad and for the Car Company at the same time. It was not the privilege of the agent of the Car Company to sell a berth to any party unless he had a first-class ticket on the railroad, or a ticket which entitled him to travel in the Pullman car or in a first-class car. The agent who sold the tickets had to determine whether or not he had such a railroad ticket as would entitle him to ride in the first-class car. In deciding that question, I am of the opinion that he acted as the agent of the Railroad Company, because that question had to be passed upon before he could sell him a sleeping berth. It is difficult, however, to divide these two duties, but I am of opinion, under the proof, that he acted as the agent of the Railroad Company. When the agent decided that the plaintiff here did not have such a ticket as entitled him to ride in a first-class car, then he was justified in not selling him a sleeping car ticket. He was then the agent for the Illinois Central Railroad Company, and the defendant here is not responsible for his acts."

The same decisive question in this case which was decided in the Delgado & Sims, the Lawrence, the Lemon, and the Paddock cases, came up for decision under a different state of facts in the Taylor case, reported in 65 Indiana, 153.

I was agreeably amazed to find that the learned counsel of the plaintiff relied upon that case in support of their contention. The Supreme Court of Indiana, in that case, declared in the strongest implicit terms the doctrine for which we now contend.

In the Taylor case the plaintiff had purchased the use of a berth from Indianapolis to New York, but before reaching New York, to wit, at Pittsburg, Pennsylvania, the *Pullman Car Company* detached from the Railway train the sleeper in which the plaintiff had his berth, and attached the same to another train traveling in a different direction, and failed

to tender to the plaintiff a berth of equal accommodation in another sleeper.

In the course of its opinion in that case the Court made certain deliverances, which are conclusive in favor of the defendant in this case. Among those deliverances it said:

"The defendant (the Pullman Palace Car Company) did not undertake to transport the plaintiff from Indianapolis to New York, either as a common carrier, or otherwise. The contract for transportation was made with the Railroad, or Companies of whom he purchased tickets for transportation. * * *

"It seems to us to be clear that the contract with the plaintiff embraced the obligation upon the defendant to furnish the sleeping-car accommodation for a continuous trip from one point to the other, so that the plaintiff could go with the continuous train, as he might be bound to do on the purchase of an ordinary Railroad ticket, without provision for stopping off.

"It also seems to us that the defendant was bound by the contract, evidenced by the check set out and punched, as it was not merely to furnish sleeping car accommodations for the trip, but to furnish the lower berth No. 6 in the particular Car No. 96, or, at least, to furnish an equally desirable berth in the same locality in another car of equal safety, convenience and comfort. * * *

"This being the legal effect of the contract, we proceed to consider whether any defense is set up in any of the paragraphs of answer. *If the defendant furnished the sleeper to be taken through by the Railroad Company, and if the failure to take through was solely the fault of the latter, the contract of the defendant may not have been broken, for, as we have seen, the defendant did not contract for transportation.*

"By the allegations of the several paragraphs of answer it does not appear to have been any fault of the *Railroad Companies that Sleeper No. 96 was not taken through with the train that went on. On the contrary, it is expressly averred in the second and third paragraphs that the defendant the Pullman Company caused the sleeper mentioned to be detached from the train at Pittsburg.* This, also, is the fair inference from what is urged in the first paragraph in which it is averred that said Car No. 96 was left at said City of Pittsburg, and the defendant was unable to furnish the plaintiff, in either of said cars, lower berth No. 6."

What were, therefore, the facts in the Taylor case on which the Court rested its decision against the Pullman Company? It was on the express ground that the stoppage and turning back of the sleeper, and the deprivation of the plaintiff of his berth, were exclusively the acts and deeds of the Pullman Company, in which the Railroad Company did not participate. In that case the Pullman Company alone

turned back the sleeper in which Taylor had bought his berth, and did not tender him a corresponding berth in another car of equal accommodations; and, therefore, in that case, the Pullman Company was condemned, as it clearly ought to have been.

It is too obvious for argument that, if the Supreme Court of Indiana had found in that case the fact as it appears in this case, to wit: that the act of cutting off and turning back the sleeper, and the act of depriving the passenger of the use of his berth, had been exclusively the work of the Railroad Company, in which the Pullman Company did not participate, the Court would have found in favor of the Pullman Company.

Touching the first ground of the plaintiffs' complaint, therefore, the whole question of the defendant's liability turns on this naked question of fact: Was the sleeper "Ysidora" arrested at Texline and turned back to Denver, and the plaintiffs thereby deprived of their drawing-room, by the action of the Pullman Company?

In answer to that question the testimony is concurrent and overwhelming that the arrest and turning back of the sleeper, and the consequent deprivation of the plaintiffs' use of the drawing-room, were the sole and exclusive acts of the Railway Company.

But the testimony goes even further that that. It shows not merely that the Pullman Company took no part in those acts, but, furthermore, that the conductor of the defendant did all that was in his power to do to prevent these acts of the Railway. *The only remote connection the defendant Company had with those acts was merely the conveyance to the plaintiffs, through the medium of its servants, of the instructions laid on them by the Railway conductor.*

The evidence shows that the Pullman conductor frankly and courageously deplored, reprobated and condemned the action of the Railway Company, and sought, as far as it lay

within his power, to make the unpleasant situation tolerable to all of the passengers on the sleeper.

IV.

The second ground on which the plaintiffs rest their complaint is that the Pullman Company did not have attached to the next train going south, a sleeper which had in it a vacant drawing-room reserved for the use of the plaintiffs until they reached the Canadian River.

That this complaint involves no cause of action against the Pullman Company, but exclusively against the Railroad Company, who alone controlled the selection and movements of the Pullman sleepers leased by it and forming a part of its trains, has already been demonstrated. But, in view of the persistent contention of the plaintiffs' counsel on this point, it seems proper to supplement what has already been said by a more detailed response.

When the plaintiffs were deprived of their drawing-room, on whom did the obligation devolve of tendering them an equal drawing-room in another car? Did that obligation devolve on the Pullman Company, who had done nothing to deprive them of their drawing-room; who was not a party to the Railroad contract; and who had no control over the movement or SELECTION of its leased cars?

Or did the obligation devolve on the Railway Company, by whose exclusive action the plaintiffs were deprived of their drawing-room; and who had the supreme control of the Pullman cars, and the *supreme and exclusive power of selecting which Pullman car leased by it should be attached to each of its trains?*

The question would seem to answer itself. When one

arty to a contract is deprived of his rights by the act of a third person, one of two alternative obligations arises against the wrongdoer; to restore his rights to the person injured, or pay such damages as have been incurred by him until the restoration of his rights.

These alternative obligations are in the nature of *penalties* imposed by the law on the wrongdoer, and are never imposed on one not a participant in the wrong.

What do we find in this case? We find that the acts which deprived the plaintiffs of the use of their drawing-room, and caused the sufferings they endured, were exclusively the acts of the Railroad Company, and that the first place an equal drawing-room was tendered the plaintiffs was on the south side of the Canadian River, 85 miles from Texline.

If, therefore, the plaintiffs suffered any damages between the moment they were deprived of the use of their drawing-room by the Railroad Company, and the moment the other drawing-room was tendered them, south of the Canadian River, those damages are recoverable from the *Railroad Company*, whose acts caused the damages, and not from the Pullman Company, who was a stranger to the acts.

The more we reflect, by the light of the evidence, on the complaint of plaintiffs against the Pullman Company, because the next sleeper going south did not have a Pullman car attached with a drawing-room in it, and that drawing-room reserved for the use of these plaintiffs, the more flagrant appears the unreason and injustice of the complaint.

The evidence being that the selection, and the character and structure and the number Pullman cars leased by the railroad, to be attached to any one of the railway trains, are matters exclusively determined by the Railway Company, and in respect of which the Pullman Company has no voice, it seems clear that the Pullman Company cannot be held

liable because the sleeper, which was attached by the railway to its next train going south did not have a drawing-room in it, reserved for the occupation of these plaintiffs.

To hold the Pullman Company, under such conditions, to liability, would be to disregard the rulings of every Court in the Union, and shock the dullest sense of justice.

The Pullman Company is held, and justly held, to liability for all illegal injuries caused by its own acts. And it is also justly held to the obligation of immediately tendering to a passenger accommodations equal to those of which the passenger may have been deprived, *when the deprivation is the act of the Pullman Company.*

But when it appears, as in this case, that the injuries complained of were wholly caused by the acts of the Railroad Company; and when it further appears, as in this case, that the deprivation of the drawing-room, complained of, was also exclusively the act of the Railroad Company, who had absolute control of the selection and occupation of the Pullman cars operated by it, then clearly, the obligation to restore to the plaintiffs the use of the deprived drawing-room, or one of equal comfort, devolved on the Railroad Company who had caused such deprivation, and not on the Pullman Company who had not only not approved the deprivation, but had done all it could to prevent it.

An apter illustration of this can hardly be conceived than is actually found in the decision of the Circuit Court of Appeals in the case of Dupre against Mann's Boudoir Car Company, 54 Federal Reporter, 646, which, curious to say, is cited as authority by the learned counsel of the plaintiffs.

The extract from the decision read by the counsel of plaintiffs in the oral argument before the lower Court embraced the instruction to the jury asked for by the defendant Company, and refused by the trial Judge, and the deliverance of the lower Court on the subject of that instruction.

The instruction referred to reads as follows :

"If you find from the evidence that, by the standing order of the Railroad Company, all of the berths in Letter 'B' were reserved for Meridian passengers, and that the *conductor of the defendant erroneously sold the lower berth in Letter 'B' to the plaintiff;* and you further find that within a reasonable time before reaching Meridian he notified the plaintiff of his error, and, at the same time, informed her that her berth was reserved for, and had been taken by passengers at Meridian; and you further find that the conductor offered the plaintiff the occupation of another berth in the car equal to the berth in Letter 'B;' and you further find that the plaintiff refused to accept this other berth, and thereupon left the car without being compelled to do so by the conductor, then I instruct you that the defendant was not guilty of such a breach of the contract with the plaintiff as would entitle the plaintiff to recover damages on that account."

Commenting on the above the Court of Appeals said :

"This charge we consider substantially sound, and applicable to the issues of fact and the evidence in the case, and either it should have been given as requested, or the Judge of the Circuit Court should have charged the Jury on the point, and substantially to the effect of this request."

The argument of comfort which the counsel of plaintiffs sought to deduce from the foregoing was this :

That as it was necessary for the Pullman Company, in order to exonerate itself from liability, to tender the plaintiff in the *Dupre* case a room equal in accommodation to the one of which she had been deprived, so likewise it was necessary for the Pullman Company to make such a tender to the plaintiff in the *instant* case in order to exonerate itself from liability.

This argument ignores the essential facts which differentiate this case from the Dupre case; and thereby it presents for consideration an issue which is not tendered in the present case.

The issue tendered in the Dupre case was whether the Sleeping Car Company was not required, in order to exonerate itself from liability, to restore to a passenger what the passenger had been deprived of by the fault and action of its *own* servants.

The radically unkin and wholly different issue tendered by the facts of the present case is whether the Pullman

Company, in order to exonerate itself from liability, is required to restore to the passenger what the passenger had been deprived of, not by the fault and acts of its own servants, but exclusively by the fault and acts of the Railroad Company; the one who had the exclusive dominion and control over the movements, occupation and selections of Pullman sleepers, and who exercised its absolute power against the persistent and indignant opposition of the Pullman Company.

In the Dupre case, the Court of Appeals held the sleeping car company to the liability of restoring the deprived space, or its equivalent, on the ground that the deprivation of that space had been caused by the act of its own servants. In other words, the Court, in that case, placed the obligation of repairing a wrong where eternal justice always places it, on the one who has done the wrong.

V.

The last and supplemental complaint urged, of which we hear for the first time in the argument of the counsel, and of which we had no information in the petition of the plaintiffs, is that the conductor of the Pullman car which passed Texline on the night of the 28th of September *did not tender to the plaintiffs the use of the smoking-room.*

The answer is that the failure to tender the smoking-room *is* not *alleged by the plaintiffs in their petition as a ground of complaint.*

That being the case, the failure to make such a tender cannot be postulated as a ground for damages. A defendant may be held in damages for a certain wrong when proper proofs of the wrong are submitted and when the

plaintiffs have tendered such wrong as a ground of complaint; but he can hardly be held in damages for what the plaintiffs have not complained of.

Reasoning from the petition of the plaintiff it would seem that the sole ground of complaint alleged by the plaintiffs, as to what happened at Texline on the night of the 28th of September was, that a drawing-room was not tendered to them which was equal in every respect to the one of which they have been deprived.

They must abide by their pleadings. They must stand or fall on the grounds of complaint expressed in their petition; not on the ground of a complaint founding in the sympathies of their counsel, and formulated for the first time in argument.

But let us waive for a moment this perfect legal defense, and consider the complaint on its merits.

The evidence is that there were only one or two upper berths unoccupied in the sleeper on the night of the 28 of September, when the train reached Texline; that the smoking-room, which had a double seat in it, was exclusively assigned and set apart for the use of the conductor and the porter to sleep in, during the long voyages on which the car ran, which voyages occupied the whole of six days, running continuously day and night.

How absolutely necessary in such voyages, and in all voyages involving day and night travel, it is to abstract from passenger use and set apart some place in which the servants of the Company are to sleep, is too obvious for comment. Not only is the health of these servants dependent on the rest assured to them by such a place, but their capacity to perform the services they render passengers is absolutely conditioned on this rest. Hence, the necessity of abstracting from commerce, and appropriating for the accommodation of these servants, some portion of space in the sleeper.

That the space thus set apart for their use, and thus *en-*

tirely withdrawn from passenger use, was appropriate for the purpose, first, because it was not more than was necessary; and, second, because it was wholly unfit for passenger use as a *sleeping* place, is apparent from the facts in evidence in respect of that smoking-room.

Those facts are that the smoking-room was immediately adjoining the water-closet and lavatory for the gentlemen who were passengers on the sleeper; that it was appropriated to those passengers during the day and part of the night as a place in which to smoke, to lounge and to make their toilets; that it was not designed, and entirely unfit, for the use of ladies; that it was never sold to any passenger; that it was entirely outside of commerce and exclusively and necessarily reserved for the occupation of the servants of the Pullman Company.

It is further in evidence that the plaintiffs made no request for the use of said smoking-room, and, hence, that the conductor did not deny to these ladies the use of the same.

It is further in evidence that the only thing the plaintiff's applied for and demanded was a drawing-room, and that they absolutely declined the use of the only space in the sleeper, *appropriated to passengers, at that time unoccupied.*

It is thus clear that the smoking-room was absolutely withdrawn from commerce as a sleeping-room, and reasonably appropriated to another and necessary use, and therefore no obligation devolved on the Pullman Company to tender it to the use of the plaintiffs.

Again. If the smoking-room had been given up to the plaintiffs' occupation, and had been used by them as a sleeping apartment, it would have deprived the gentlemen passengers on the car of the use of the same as a smoking-room, as a lounging place, and also as a place in which to make their toilets. To these general uses, as the evidence shows, the smoking-room was appropriated. Hence, if it had been, by any act of the Pullman Company, withdrawn

from these general uses in favor of all the passengers and exclusively appropriated to the use of one or two passengers as a sleeping room, the other passengers, having the contract right of free and equal access to the smoking-room for the purposes already described, would have subjected the Pullman Company to actions for damages on the part of those passengers thus deprived of their rights of use.

VI.

The fact being undisputed that, when on the night of the 28th of September the plaintiffs applied for a drawing-room in the Pullman car attached to the train going south the conductor of said car tendered to them the use of the only unoccupied berth assigned to passengers at that time in the car, it is clear, on reason and authority, that the Pullman Company thereby discharged its entire obligation to the plaintiffs, and therefore left them no just cause of complaint.

A case has been recently decided which so concurs, as to its salient facts, with the instant case, that I cannot do better than submit the decision in that case. I refer to the case of Bliss vs. The Pullman Company, reported in 16 Chicago Legal News, 338:

"SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

"S. E. Bliss)
" vs.
" Pullman's Palace Car Company.)

"SMITH, J., delivered the opinion of the Court.

"In this case a motion for a new trial was overruled by Judge SMITH.

"Plaintiff, accompanied by his wife, left Chicago on the night of January 23, 1883, having a sleeping car ticket for a double lower berth from Chicago to Nashville on a sleeping car which was bound through to Jacksonville, Fla. Snow and accidents so delayed the train, which was due at Louisville at noon of the 24th, that it did not arrive there till eight o'clock on the evening of that day. The through train for Jacksonville

had left on its time at noon, and the next through train would start at noon of the following day. By order of the Railroad authorities, the sleeper in which plaintiff traveled was ordered to lie over for that train and plaintiff was given a transfer ticket good for accommodations in an earlier train leaving Louisville that night for Nashville. He applied at that train for a berth, but not until all the lower berths had been assigned, leaving only upper berths on the car. He refused to accept the upper berth as not being the corresponding accommodations to which his ticket entitled him in the car in which he commenced his journey. He thereupon went with his wife into the ordinary coach of the Railway and completed his journey therein to Nashville, and sued the sleeping car company for $5,000 damages for violation of contract. It was in evidence and undisputed that the Pullman Company had no control over the make-up or movement of the train. On the trial of the cause the court gave the following instructions among others:

"4. The jury are instructed that the plaintiff has no right to complain if he received or was offered the best accommodation in the sleeping car at Louisville, which, at the time of his application, the Pullman Company had at its command, and which, under all the circumstance of the case, it was practicable for the Company to furnish. And if you believe from the evidence that the plaintiff by his own negligence failed to make application for one of the lower berths until all of them had been sold to other parties, he has no right to complain if he was then assigned to an upper berth, furnishing substantially the same accommodations.

"5. The jury are instructed that the Pullman Company had no control over the movements or the making up of the trains of the Railway Company, but the same were altogether controlled by and within the power of the Railroad Company, and therefore the Pullman Company is not responsible to a passenger holding a berth in its car for a detention growing out of the delay to the train by accident or otherwise.

"Verdict for the defendant. Motion for a new trial overruled."

As in the Bliss case so it is in the present case. When the next Pullman car came to hand, after the arrest and sending back of the car on which the plaintiffs started from Denver, the very best space the Company had in the sleeper; which was then unoccupied, was tendered to these plaintiffs. That being done, the entire obligation of the defendant to the plaintiffs was fulfilled.

VII.

The plaintiffs declare and industriously iterate that they were not parties or privies to the contract by which certain cars of the Pullman Company were leased to the Railroad Company, and that they had no knowledge of the existence of that contract, express or implied, at the time they purchased the use of a drawing room in the Pullman Car, and hence that it is not receivable in evidence against them. The admission, *vel non*, of this contract, in cases like the present, can hardly be regarded as an open question. Its admission has been so uniformly upheld by the courts that I feel warranted in stating, as settled doctrine, that in all controversies like this, involving the use and control by the Railroad Company of cars leased by it from the Pullman Company, and publicly employed by it in its business of transporting passengers, the contract between it and the Pullman Company defining its use and control of the Pullman cars leased by it will always be received and considered. In illustration of this see the cases of Delgado & Sims, Dupre, Lemon, Lawrence, Roy and others.

But, apart from the provisions of this contract, I maintain that the control of the Pullman cars by the Railroad Companies who lease and operate them is necessarily involved in the public employment of those cars by the Railroad Companies as parts of their vehicles of transportation, and hence that thereby the fact of the control of those cars by the Railroad Companies is sufficiently advertised to every one who travels on such cars; is as much thereby brought home to the passengers of the Pullman Company as if they were parties to the contract between the Pullman Company and the Railroad Company.

The counsel of plaintiff persistently press the proposition that it was the duty of the Pullman Company not only to bring home to passengers, in some express and personal

way, what it was that it undertook to do by *its* contract with them, but, also, that it was the duty of the Pullman Company to bring home to passengers what it was that the Railroad Company undertook to do by *its* contract with passengers; and the learned counsel in this case went so far in the lower Court as to declare that it was a fraud on the traveling public for the Pullman Company to be silent as to such thing, and thereby keep the passengers in ignorance.

The reply to this contention is short and decisive, and is this: That no such duty devolves on the defendant company. The Pullman Company is under no duty to bring home to passengers, or to anybody else, the obligations of contracts; things which are pure matters of law; and, especially, things arising naturally and obviously out of the contracts made.

It is clear that the passenger who enters into agreement with the Pullman Company for the occupation of space in its sleepers, knows perfectly well that he has previously made a contract of transportation with the Railway Company. That there can be no doubt of that fact is shown by the circumstance that, on the very face of every Pullman ticket issued to passengers, is blazoned the fact that the Pullman ticket is not good, except on condition that the passenger who receives the same holds, at the time, a first-class railway ticket. This railway ticket embodies the contract of transportation, and, hence, the passenger owning such a ticket must be held to know the rights and obligations of that contract, and everything that is reasonably and legally implied by it. He must be held to know, for example, that the one who undertakes the contract to transport, must, as a necessary and reasonable incident involved in that contract, control the movements of the vehicles employed in the work of that transportation. Such a passenger must, as a reasonable man, be held to know that if such huge transporters as Railroad Companies did not control the move-

ments of the vehicles used by them in the business of transportation, whether such vehicles are owned by the Railway Companies or used and operated by them under lease, they could not fulfill their contracts of carriage with their passengers. Just as such passengers must be held to know that the condition of the Railway bed, the Railway bridges, the Railway machinery, and the Railway equipments, generally, are matters that appertain exclusively to the contract of transportation; and hence, that the Railway Company, and the Railway Company alone, must be held liable, if, on account of a defect in any one of those instrumentalities, the continuity of the carriage is interrupted, or the comfort of the same impaired.

And, similarly, as to the contract which the passenger makes with the Pullman Company. The nature and character and the legal obligations of that contract every passenger must be held to know. He knows that that contract is distinct and entirely different from the contract of transportation which he has already made with the Railway Company. The contract itself, as plainly evidenced by the Pullman ticket, advertises the passenger of the determinative fact that what he buys from the Pullman Company is exclusively the use and occupation of a certain space in the sleeper while he is being transported by the Railway Company, subject, of course, to the control of the sleeper by the Railroad Company arising out of, and necessarily implied by, its public and notorious use by the Railroad Company as one of its vehicles of transportation.

And such a passenger must be held to know the foregoing facts, not merely because they are reasonably implied by the contract itself, but also by the evidence of long, continuous and notorious custom and usage. These contracts have been constantly made with the Pullman Company by the traveling public for the past forty years, and the nature and character and specific obligations of these contracts have

been so repeatedly construed and settled by the Courts that it is no more necessary to introduce evidence in respect of the same than it is in respect of the duties of a public official.

The Courts now take the same judicial notice of the respective obligations of these contracts that they take of the obligations and duties of a bank cashier.

To Recapitulate.

I maintain:

1st. That the special allegations of the plaintiff's petition, and the special denial of the same by the defendant's answer, lay the ground for the introduction in evidence of the contract between the Companies, the testimony of witnesses, and any other evidence going to show the nature, limitations and obligations of the contract made with plaintiff by the Pullman Company.

2. That the plaintiffs as travelers on railroads, and on board of Pullman cars, forming a part of the trains of those railroads, cannot plead ignorance of the railroad's control over Pullman cars leased by it, and publicly used and operated by it as one of its own cars in the business of transporting passengers. The long-continued, public and notorious use of the Pullman cars by the Railway Company leasing them, as part of its trains, as its own vehicles, in the business of transportation, legally advertises and brings home to every one who travels on such cars the fact that they are controlled in their use, occupation and movement, as vehicles of transportation, by the Railroad Company.

While, therefore, the Pullman passengers may not be parties to the contract between the Companies, by which the control of Pullman cars is given to the Railroad Company leasing them, those passengers, for the reasons above given,

are as completely affected with notice of that control, as if they were parties to the contract stipulating it. Knowledge of a fact, however acquired, is a perfect bar to any plea of ignorance of the fact. That persons may be as effectively charged with knowledge of a certain thing by its long-continued and notorious existence, as by the evidence of a written agreement, or by the testimony of witnesses, is a proposition immemorially settled.

VIII.

But let it be supposed, for argument's sake, that the foregoing does not conclusively establish the grounds of defense set up by the Pullman Company; that the weight of view is in favor of the plaintiffs; that if the issues involved were properly here on a writ of error the conclusions of this Court might differ from those of the Court of Appeals. What then? Would that involve the entertainment of the *certiorari* applied for?

My understanding is that the Act of Congress creating the Courts of Appeals was, *quoad* this Court, a relief and not an enabling Act; that it was intended to lighten the overburden of this Court's work and not put on it the task of reviewing the decisions of yet another Tribunal. That this is the correct understanding seems clearly to appear from the uniform deliverances of your Honors. Passing on the question in the case of Lau Ow Bew, 141 U. S., 583, the Court say:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction, and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of a Court of Appeals is made final to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of suffi-

cient importance in itself and sufficiently open to controversy to make it the duty of this Court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error."

The case of Lau Ow Bew was one of great public importance, involving the relation of the United States with a foreign nation and not a mere disputed construction of a contract between two of our own citizens. The issues in that case, furthermore, were new, unsettled and open to controversy, and, hence, the *certiorari* therein applied for was granted.

Subsequently, in the case of Construction Co. vs. Railway Co., 148 U. S., 383, referring to its jurisdiction in cases like the one at bar, this Court said that its jurisdiction " should be exercised sparingly and with great caution, *and only in cases of peculiar gravity and general importance* or in order to secure uniformity of decision (141 U. S., 583; 144 do. 47; *In re* Woods, 143 U. S., 202).

Accordingly, while there have been many applications to this Court for writs of *certiorari* to the Circuit Courts of Appeals under this provision, two only have been granted; the one in the Law Ow Bew's case, above cited, which involved a grave question of public international law affecting the relations between the United States and a foreign country, and the other in *Fabre, petitioner*, No. 1237 of the *present* term, an Admiralty case which presented an important question as to the rules of navigation and in which the decree of the Circuit Court of Appeals for the Second Circuit *reversed a decree of the District Judge and was dissented from by one of the three Circuit Judges, and in each of those cases the Circuit Court of Appeals had declined to certify the question to this Court.*" (The italics are mine.)

The cases in which a *certiorari* may be granted and those in which it will not be granted are discriminated in *Re* Woods, *143 U. S., 202.* Explaining its denial of the writ in that case the Court said :

"We do not regard the inquiry whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

I venture to submit that the present case does not include any of the elements which warrant a *certiorari*. No issue involving our relations with other countries arises; it is not a case of peculiar gravity and general importance; no reversal of the judgment of the trial Judge and no dissenting opinion of one of the Judges of the Court of Appeals is involved; nor is the decision of the Court of Appeals one at war with the current of uniform decisions on the subject matters embraced by it. On the contrary, the issues sought to be reviewed here concern only the interpretation of a private contract between two of our own citizens, and the decision of the Court of Appeals on those issues rests solidly on reason, principle and authority.

The action of the Court on applications for writs of *certiorari* in cases like this is exemplified by the ruling of your Honors in R. R. Co. vs. Osborne, 146 U. S., 354.

If such issues as are involved in the instant case may be forced on the review of this Court under writs of *certiorari* it is obvious that the beneficent purpose of the law limiting the jurisdiction of those writs would be defeated.

Respectfully submitted,

PERCY ROBERTS,

For Pullman's Palace Car Company.

163-684

Office Supreme Court, U. S.
FILED.
MAY 28 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1895.

No. ~~1039~~ 634

LAURA P. DUVAL ET AL., Petitioners,

vs.

PULLMAN PALACE CAR COMPANY.

Petition for Laura P. Duval et al. for writ of certorari to the United States Circuit Court of Appeals for the Fifth Circuit.

J. L. PEELER,
JNO. W. MADDOX,
For Petitioners.

IN

The Supreme Court of the United States.

October Term, 1895.

No. .....

LAURA P. DUVAL ET AL., Petitioners,

vs.

PULLMAN PALACE CAR COMPANY.

Petition for writ of certorari, requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court for its review and determination the case of Laura P. Duval et al., plaintiffs in error, v. Pullman Palace Car Company, defendant in error.

To the Honorable the Supreme Court of the United States:

The petition of Laura P. Duval et al. respectfully shows:

That this is a consolidation of two causes arising from the same state of facts, which briefly stated are as follows:

On September 27, 1891, petitioner Duval was in Denver in a crippled and helpless condition, unable to walk, and suffering from an accident, and was then 75 years of age, and petitioner Mary D. Maddox, her daughter, was with her on the day named, and had with her a little daughter just recovering from a spell of fever. The party desired to return to their home in Austin,

Texas, but, because of their suffering and helpless condition, would not attempt the journey unless they could procure the drawing room of one of defendant's sleeping cars, and so informed defendant's agent at Denver, when and from whom they bought their ticket.

On the day named the petitioners, together, bought a ticket from the defendant's agent at Denver, paying $20 therefor, which entitled them to the exclusive use of the drawing room of defendant's car "Ysadora," then attached to a train of the Union Pacific Railway Company en route to Fort Worth, Texas, upon which train plaintiffs also held first class tickets, entitling them to transportation, by the railroad company, from Denver, Colorado, to Fort Worth, Texas.

The petitioners entered and were given possession of the drawing room of said car by the defendant's conductor and porter in charge, and rode therein to Texline, when, at about 12 o'clock on the night of September 27th, they were compelled, by defendant's conductor and porter, to get up and dress and leave the car "Ysadora" and find accommodation at a small hotel in Texline, a small station in a sparsely-settled region of country; that while being transferred from the car to the hotel, petitioner Duval was subjected to the humiliation of being carried in the arms of the colored porter, unattended by the conductor. At this hotel they were unable to get a comfortable bed or food, and were unable to sleep during the night or the day following, during which time petitioner Duval suffered much pain from her injuries.

It was shown that the train was turned back at Texline by command of the railroad officials, because of a washout at the Canadian river, about 100 miles further down the road, and that, in turning plaintiffs out of the drawing room, defendant's conductor and porter were acting under orders from the train conductor.

On the night following, at about 12 o'clock, the next train from Denver arrived, and the passengers of the previous train were permitted to get on board; petitioners held a transfer check issued to them by defendant's conductor in charge of the car "Ysadora," showing their right to complete their journey in

the drawing room of defendant's car attached to next train; they applied to defendant's conductor in charge of the car attached, and were told by him that his car had no drawing room, and that he had but one berth unoccupied, which was an upper berth. In this car there was the gentlemen's smoking room, with accommodations for a bed for one and a comfortable double seat, unoccupied save by the conductor and porter. This compartment was not tendered petitioners after notice to the conductor of their condition and rights, and they were refused admission to defendant's said car, and were compelled to enter the ordinary day coaches of the train and ride therein from 12 o'clock of the night of September 28th, until they reached the Canadian river at 7 o'clock next morning.

Petitioner Maddox succeeded in finding a seat for her mother and sick child in that part of the ordinary car set apart to whites, but was unable to find a seat for herself therein, and was compelled to ride in the negro compartment of the car, among colored persons, from Texline to the Canadian river, and that she and her mother were without sleep or rest after being forced to leave the drawing room of the car "Ysadora," on the night of September 27th, until the morning of September 29th.

That November 24th, 1891, petitioners Laura P. Duval and Mary D. Maddox, joined by her husband, John W. Maddox, brought their separate suits against the Pullman Palace Car Company in the District Court of Travis County, Texas, for the sum of $25,000 each, for depriving them of accommodation in its cars, and upon petition of the Pullman Palace Car Company, the causes were on the 5th day of January, 1892, removed to the United States Circuit Court for the Fifth Circuit and Western District of Texas, at Austin, where they were consolidated by agreement; and at the trial the court refused to give the instructions asked by petitioners (Trans., 47–51), **"on the ground that, in the judgment of the court, the material and controlling facts about which there was no conflict in the testimony, show that defendant discharged the legal obligations which it owed plaintiffs, and therefore incurred no liability to respond in damages to the plaintiffs,"** and upon a peremptory instruction

from the court, the jury found for the Pullman Palace Car Co., and judgments were separately entered as provided in the agreement of consolidation. Petitioners moved for a new trial, which was refused; and thereupon petitioners duly removed said cause to the United States Circuit Court of Appeals for the Fifth Circuit, by writ of error, which was docketed in said Circuit Court of Appeals as No. 180, styled Laura P. Duval et al., plaintiffs in error, v. Pullman Palace Car Company, defendant in error, and was heard upon such writ of error by said Circuit Court of Appeals, who upon such hearing, affirmed the judgment of the court below on the 29th day of May, 1894.

That petitioners in due time filed a petition for rehearing in said Circuit Court of Appeals, which was by said court overruled on the 27th of November, 1894.

That all the proceedings and holdings of said Circuit Court of Appeals in said cause will fully appear in the certified record herewith filed.

That your petitioners submit that there was error, and manifest error, in the holdings and rulings of said Circuit Court of Appeals in said cause, in this:

I.

The court erred in holding that defendant is not liable to respond in damages to petitioners for failure to furnish them drawing room accommodations September 28th from Texline to the Canadian river; because, if defendant had the right to select the car on that day, it is liable because it *did not select* one similar to the "Ysadora;" and if the carrier alone had the right to select, as was done on that day, a car without drawing room accommodations, then defendant is liable because it had voluntarily, by undisclosed contract with the carrier, deprived itself of the right to select such car as would enable it to furnish petitioners drawing room accommodations from Texline to the Canadian river.

II.

The court erred in holding that defendant is not liable in damages to petitioners for failure to reserve for them two double

lower berths in the car without state room accommodations which was attached to the carrier's train September 28th; because if defendant had such control of its cars internally as would enable it to do so, it was utter disregard of petitioners' helpless and crippled condition, and of their contract rights, not to reserve the best accommodations in said car for petitioners, and permit them to continue their journey therein from Texline to the Canadian; and if defendant had parted with the internal control of its cars to the carrier, who might command defendant's agents and servants and compel them to sell all lower berths in said car to other persons who might desire to occupy them, then defendant is liable to petitioners because it had voluntarily put itself, its cars and servants so completely and absolutely under the control of the carrier that it had no authority nor means of performing any contract for accommodations, no matter with whom made, and how aged, sick, maimed and helpless they might be.

III.

The court erred in holding that "the allegations of the complaint were not sustained by the evidence;" for the right of petitioners to recover does not depend upon the fact that defendant was or was not a common carrier, as plaintiffs procured transportation from the railroad; and complaint is made and fully sustained by the evidence, that defendant sold plaintiffs the right during the journey to occupy a drawing room in one of its cars, and that they were deprived of such accommodations from Texline to the Canadian river, either because defendant *would* not furnish such accommodations or because defendant had voluntarily, by contract with the carrier, deprived itself of the ability to do so.

IV.

The court erred in basing its decision on the mistaken theory that the only ground of complaint is, that petitioners were ejected and the car Ysadora turned back at Texline; for the vigor of petitioners' complaint is, that they were deprived of extra comfortable accommodation in a drawing room, and of all

accommodations in defendant's cars from Texline to the Canadian river; and not because of an interrupted journey, nor by reason of any breach of the railway company's contract as a common carrier.

V.

The court erred in not holding defendant liable to petitioners in this case, because defendant, by contract with the carrier, deprived itself of the selection of its cars and the control thereof, internally as well as externally, and bound its servants and agents to obey the railroad company, and this was a voluntary relinquishment by defendant to the carrier which deprived defendant of the ability to perform the contract with petitioners.

VI.

The court erred in not holding defendant liable to petitioners in this cause; because defendant by its voluntary contract, authorized the railroad company to command defendant's servants as it did, and eject plaintiffs from the car Ysadora at Texline; and further because the carrier was not only authorized to eject petitioners at Texline, but also to eject them at Trinidad, or at any other place, even in the station at Denver, before they began their journey.

VII.

The court erred in not holding that defendant is liable in damages to petitioners, because defendant's contract depriving itself of the ability to furnish petitioners with accommodations in its cars was voluntarily made without the knowledge of petitioners, and was by defendant concealed and hidden from them.

That all these questions were presented to the said Circuit Court and to the said Circuit Court of Appeals, and were by said courts decided in favor of said Pullman Palace Car Company.

Your petitioners respectfully submit that this case involves the grave and important question, Can the Pullman Palace Car Co. contract with impunity

and avoid liability for non-performance of its contract obligations, by showing that it has, by undisclosed contract with the carrier, voluntarily deprived itself of the ability to perform its contracts? Petitioners submit that the decision of the United States Circuit Court of Appeals complained of is contrary to law, against the evidence, and contrary to the principles of reason; and in furtherance of justice and because your petitioners are otherwise remediless, the writ hereinafter prayed for should be directed to issue.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Circuit Court of Appeals to certify and send to this court, on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in the said cause entitled Laura P. Duval et al., plaintiffs in error, v. Pullman Palace Car Company, defendant in error, number 180, to the end that said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891; or that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the provisions of said act; and that said judgment of said Circuit Court of Appeals in said cause, and every part thereof, be reversed by this honorable court.

Petitioners further represent that Percy Roberts, Esq., who resides in the city of New Orleans, State of Louisiana, is counsel for the Pullman Palace Car Company, and they pray that said

Roberts be duly notified of the filing of this petition in accordance with the rules of this honorable court.

LAURA P. DUVAL ET AL.
J. L. PEELER, of Counsel,
J. W. MADDOX, for Petitioners.

State of Texas. }
County of Travis. }

Before me the undersigned authority, on this day personally appeared J. L. Peeler, who, after being duly sworn, on his oath says that he is counsel for Laura P. Duval et al., the petitioners above named, and that he has read said petition by him subscribed, and that the facts therein stated are true.

J. L. PEELER.

Sworn to before me and subscribed in my presence this the 21st day of May, A. D. 1895.

[SEAL] R. C. SHELLEY,
Notary Public, Travis county, Texas.

Office Supreme Court, U. S.
FILED.
MAY 28 1895
JAMES H. McKENNEY,
CLERK.

IN

The Supreme Court of the United States.

October Term, 1895.

No. 1039

LAURA P. DUVAL ET AL., Petitioners,

vs.

PULLMAN PALACE CAR COMPANY.

On petition for writ of certorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT FOR PETITIONERS.

JOHN W. MADDOX,
Attorney for Petitioners, Laura P. Duval et al.
J. L. PEELER,
Of Counsel.

IN

The Supreme Court of the United States.

October Term, 1895.

No. .....

LAURA P. DUVAL ET AL., Petitioners,

vs.

PULLMAN PALACE CAR COMPANY.

On petition for writ of certorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT FOR PETITIONERS.

The material and controlling facts of this cause, and about which there was no conflict in the testimony are:

1. The defendant Pullman Company sold petitioners drawing room accommodations in the car Ysidora, which entitled them to occupy said drawing room from Denver to Fort Worth, and defendant had full notice of the helpless and suffering condition of petitioners. (Printed record, pages 30, 31, and opinion, pages 68, 69).

2. The car Ysidora was a properly equipped car with drawing room accommodations; said car was hauled by the railroad company from Denver to Texline, where petitioners were called from their berths in the drawing room and required to leave the car, they being required to do so by defendant company's negro porter, who acted under the directions of the railroad company, and at Texline said car was turned back to Denver by the railroad company. (Printed record, page 32, and opinion 69).

3. The defendant company knew of the aged, crippled and helpless condition of petitioner Duval; of the delicate condition of Fannie, the little daughter of petitioner Maddox; that petitioners had bought and paid for drawing room accommodations in the car Ysidora, from Denver to Fort Worth; and that they held defendant company's check for such accommodation from Texline to Fort Worth. (Printed record, page 31).

4. That the train which arrived at Texline from Denver on the night of the 28th of September did not have a properly equipped car attached, with the drawing room accommodations, as the car Ysidora had; but was an inferior car which had no drawing room accommodations; and that all the lower berths in said car, and all the upper berths, except one, were sold and occupied. That the Pullman conductor did not offer petitioners the lower berths in the smoking section, and that neither the porter nor the conductor of said car rendered petitioners any assistance in boarding said train, nor made any effort to find them seats in *any* car, although then informed of their helpless condition, and that they held defendant company's check for drawing room accommodations. (Printed record, pages 33, 34).

5. There is no evidence which shows that defendant company furnished to the railroad company at Denver for its train on the 28th of September, a properly equipped car with drawing room accommodations, or made any effort to perform its contract with petitioners; nor does the evidence show that the railroad company refused to haul any car furnished by defendant company on said day.

6. Defendant company did not offer petitioners *any* accommodations on its car from Texline to the Canadian river that could be occupied by them. (Printed record, page 34).

7. The Pullman Company in the contract with the railroad company bound itself to furnish properly equipped cars, improved up to the standard of the best sleeping and parlor cars generally in use on trunk line railroads in the United States, and it had sold petitioners the right to occupy the stateroom in such car. (Printed record, pages 36, 37, article 1, sections 1 and 4).

8. Defendant company had a contract with the railroad company, by which the latter company controlled the movements of defendant's cars. (Printed record, pages 36, 37, article 1, sections 1, 3 and 4; and article 2, section 1).

9. There is no evidence that shows that petitioners had notice of the existence of such contract between defendant company and the railroad company. On the contrary, the testimony of Smith, the division superintendent of the Pullman Palace Car Company at Denver, was that said contract had never been printed for the information of, nor its contents been made known to the public; and the tickets for stateroom accommodations sold to petitioners, does not mention the existence of such contract. (Printed record, page 45; Superintendent Smith's testimony, 3).

The Circuit Court refused all instructions to the jury asked by petitioners, and gave the jury peremptory instructions to find for the defendant company "on the ground that, in the judgment of the court, the material and controlling facts, about which there was no conflict in the testimony, show that the defendant discharged the legal obligations which it owed plaintiffs, and therefore incurred no liability to respond in damages to plaintiffs." (Printed record, page 51).

THE INSTRUCTIONS ASKED BY PETITIONERS WERE:

I.

The plaintiffs ask the Court to charge the jury:

That if you find from the evidence, that plaintiffs bought from defendant company on September 27, 1891, at Denver, Colorado, and received from it its ticket entitling them to oc-

cupy the drawing room of its car "Isadora," then attached to a railway train upon which plaintiffs had right of transportation as passengers for hire from Denver, Colorado, to Fort Worth, Texas, and that such ticket issued to plaintiff by defendant company entitled them to occupy the drawing room in said car, from Denver to Fort Worth, then the court instructs you that it was the duty of defendant company to permit plaintiffs to occupy said drawing room in said car or to provide one of equal comfort and accommodations while plaintiffs were en route from Denver to Fort Worth.

And if the jury find from the evidence that said car Isadora was stopped at Texline, while en route, and was turned back, and plaintiffs were required by the servants of the defendant company to vacate said drawing room and leave the said car at about the the hour of eleven o'clock p. m. on the night of September 27, 1891; and were not provided by defendant with like accommodations in a similar car, until the morning of September 29, 1891, and were compelled to take accommodations at a hotel at Texline, and remain there until the following night, until the arrival of the first train going toward Fort Worth, and were on said train refused admission to or suitable accommodation in the sleeping car of defendant company by its servants in charge of such car, so attached to said train of the 28th of September, and were, in consequence, compelled to take passage in the ordinary day coach of said train, then you are instructed that the plaintiffs are entitled to recover from the defendant company their damages, if any, sustained by reason of the facts so found, and in estimating plaintiffs' damage, the court gives you the following instructions as to the proper measure of damages:

1. Plaintiffs are entitled to recover from defendant by way of rebate on the price paid for the ticket, in proportion as the distance from Texline to the Canadian river bears to the entire distance from Denver to Fort Worth.

2. That plaintiffs are entitled to recover against defendant damages for the physical pain and suffering and anguish of mind suffered by them by reason of being compelled to give up the said drawing room and take other accommodations, if less comfortable, from the time they left the defendant's car, at Texline,

to the time the transfer began at the Canadian river. And you will look to the evidence and determine whether the accommodations which plaintiffs were compelled to take after leaving the car Isadora, and until they reached the Canadian river and began the transfer, were less comfortable than would have been afforded to them by remaining in the drawing room of the car Isadora had it been left at Texline, instead of being taken back, and been permitted to continue their journey therein on the following night, and remained therein until the said transfer began. And you will assess plaintiffs' damage, if you find damage, at such sum as you may deem fair and reasonable compensation to each for the physical pain and suffering and mental anguish sustained by them respectively, if any, and you will, in your verdict, find such separate sum for each plaintiff severally as you may think each entitled to. On this point, you are instructed not to allow plaintiffs damages for any pain or suffering of body or anguish of mind by reason of delay of the train, or any other discomfort occasioned to the general passengers on the train in the ordinary day coaches thereof. And you are instructed that you are limited to the time when the transfer began of the plaintiffs beyond the Canadian river, and must not take into account any pain or suffering of body or anguish of mind occurring while en route from the train beyond the river to the bridge, or on account of the peril incident to crossing the same. (Printed record, pages 47–49).

II.

The plaintiffs ask the Court to charge the jury:

That if the evidence shows that the defendant company was under contract with the railroad company, to whose train the car Isadora was attached, by which the defendant company had not the right to control its movements, and had not the power to detach its said car at Texline, on the night of September 27, 1891, so that the same might remain at said place until the arrival of the next train going in the direction of Fort Worth, and that in obedience to the orders of the railroad company, said car Isadora was stopped and turned back at Texline, and plaintiffs ejected

therefrom, by the agents and servants of defendant company in charge of said car, acting under orders from the railroad company, you are instructed that in so doing the said defendant company, its agents. and servants, in law were, and in fact acted as, the servants of the railroad company, and as such would be equally liable with the railroad company for the wrong done plaintiffs, and cannot defend in this suit on the ground that in so doing this defendant company, its agents and servants, acted by the order and direction of the railroad company.

And you are further instructed that plaintiffs have the right to recover from the defendant company, as a joint wrong-doer with the railroad company, for injuries received, if any, by being ejected from the said car and being deprived of the comforts and conveniences of said car, from said time and until the time when plaintiffs began the transfer at the Canadian river. And in estimating plaintiffs' damage you will be governed by the instructions in chief asked plaintiffs. (Printed record, pages 49–50).

III.

The plaintiffs ask the Court to instruct the jury that the uncontroverted evidence is:

1. That the Union Pacific Railway Company, by its map-folders distributed for the information of the public, represented: (1) that the railway over which plaintiffs had transportation from Denver to Fort Worth was a part of the Union Pacific Railway system; (2) that the Pullman Palace Car Company then operated the Pullman palace cars on the Union Pacific system.

2. That the Pullman Palace Car Company represented to the public and to plaintiffs, that it owned, operated and controlled the Pullman palace car "Ysadora;" said representation being made by all words and letters painted on said car, by the uniform worn by the conductor and porter on said car, by the uniform worn by the agent of the Pullman Palace Car Company at Denver, who sold the ticket to plaintiffs for the drawing room on said car, by the tickets sold to plaintiffs, and by the contract printed thereon, and by the receipt of the purchase money therefor.

And if the jury find from the evidence that the Pullman Palace Car Company had a contract with the Union Pacific Railway Company, by which it parted with all control of the movement of its said Pullman palace cars, and particularly of its said car Ysadora, then plaintiffs ask the court to instruct the jury that there is no evidence that shows that the traveling public or plaintiffs had knowledge of the existence of such contract; and that said contract be not considered by the jury as a defence on the part of defendant Pullman Palace Car Company. (Printed record, pages 50, 51.)

FIRST QUESTION.

Is the Pullman Company liable for the non-performance of its contract obligations?

To state this question is to answer it; for everyone who contracts to do a lawful thing is bound to perform that which is undertaken. Still, while the Pullman Company sold petitioners drawing room accommodation, the logical deduction from the decision of this cause by the Circuit Court of Appeals is that the only obligation of the Pullman Company was to take petitioners' money and permit them to *enter* the drawing room of its car; for that court affirms the lower court in holding that the Pullman Company "discharged the legal obligations which it owed" petitioners; when the uncontroverted facts show that the Pullman Company only permitted petitioners to enter the drawing room, and not only did nothing to protect them in the enjoyment thereof, but, as it seeks to show, authorized the railroad company to command the Pullman conductor and porter, over their protests, to eject petitioners at Texline. And it did more, as it seeks to show; it authorized the railroad company to select a car without drawing room accommodations September 28, which made it impossible for petitioners to have such accommodations from Texline to the Canadian river; and still more the Pullman Company did, as it seeks to show, it gave the carrier company the right to command the Pullman conductor to sell all accommodations in the said car without drawing room

accommodations, so that there remained unsold only one upper berth in said car, and petitioners could get no accommodations in said car; and the Pullman Company did more still; by its rules and regulations it compelled its conductor and porter to occupy the double lower berths of the smoking section, while these aged, crippled, sick and helpless petitioners sought and occupied such seats as they found for themselves in the ordinary day coach and in the negro compartment thereof.

SECOND QUESTION.

Is the Pullman Company protected from liability to petitioners by the farcical protests of its conductor, which in advance it had authorized the railroad company to disregard?

The facts show that the Pullman conductor, in depriving petitioners of their accommodations, acted under direction of the railroad, and that he protested against depriving petitioners of the drawing room and against turning the Ysadora back to Denver; and this fact is relied upon by the Pullman Company to show that it is blameless; and the Circuit Court of Appeals and the court below seem to so hold, that the Pullman conductor was acting for the railroad company in ejecting petitioners, and that he represented the Pullman Company, whose uniform he wore, only in making timorous and farcical protests to protect that company from liability to petitioners. But it is not shown that this farcical protest was kept up; for there is no evidence that the Pullman Company protested against the railroad company taking out a car without drawing room accommodations September 28th; on the contrary, the contention is, that the railroad was by the contract of the Pullman Company authorized to do so. Nor is there any evidence that the conductor's farcical protest extended to even a timorous suggestion that two double lower berths should be reserved for these helpless petitioners in that inferior car; but, on the contrary, the contention is, that the railroad company might say who should occupy this car to the exclusion of petitioners, who, with the Pullman Com

pany's check for drawing room accommodations, awaited its coming at Texline to continue their journey. So that the Pullman Company, as sought to be shown, was by its contract, rules and regulations utterly helpless to perform its contract with petitioners. Its cars, internally and externally, were under the absolute control of the carrier, and its servants were bound to obey the railroad in whatsoever they were directed to do; and still they could and did protect the Pullman Company from liability by timorous and farcical protests, which the Pullman Company in advance had authorized the carrier to disregard. We submit that such conclusions by any court is a travesty upon justice and serio-comic interpretation of contract obligations.

THIRD QUESTION.

Were the allegations of petitioners sustained by the evidence?

It was shown that petitioners procured transportation from the railroad; and complaint was made, and fully sustained by the evidence, that defendant sold plaintiffs the right to occupy a drawing room in one of its cars from Denver to Fort Worth, and that they were deprived of such accommodations from Texline to the Canadian river; and we submit that the right of petitioners to recover does not depend upon the fact that the Pullman Company is or is not a common carrier. Petitioners were deprived of accommodations in the Pullman Company's cars, and it is for this they seek to recover.

FOURTH QUESTION.

Was the fact that petitioners were ejected from the car Ysadora at Texline their only ground of complaint?

The decision of the Circuit Court of Appeals in the case at bar seems to be based solely upon the mistaken theory that the only ground of complaint is that petitioners were ejected at Texline and the car Ysadora turned back to Denver September 27,

whereas the vigor of the complaint is that petitioners were deprived of drawing room accommodations on September 28, from Texline to the Canadian river; and that between said points, on said day, they were deprived of *all accommodations in defendant's cars.* And we submit that petitioners were deprived of these extra comfortable accommodations by one of two causes, both of which were authorized by defendant: First, if, as we contend, defendant had the right September 28 to select a car similar to the Ysadora, and reserve accommodations therein for petitioners, from Texline to the Canadian river, it failed to do so, and thereby petitioners were deprived of their contract rights. And second, if, as we understand the Circuit Court of Appeals to hold, defendant had by contract parted with the right to select on September 28 a car with drawing room accommodations, and had deprived itself of the right to reserve said drawing room, or any other accommodations for petitioners from Texline to the Canadian river, then defendant was deprived of such right and ability by its own voluntary act; and the carrier, in selecting a car without drawing room accommodations September 28, and in not reserving lower berths in said car for petitioners from Texline to the Canadian river, only did that which defendant had authorized it to do. And in any case, whether our view or the opinion of the Circuit Court of Appeals be correct, whatever was done or omitted to be done, was the act of defendant; and it is liable to petitioners for the deprivation of the drawing room, and of all accommodations in its cars from Texline to the Canadian river.

FIFTH QUESTION.

What are the relations existing between the Pullman Company and the railroad companies, of which petitioners were bound to take notice?

1. *That the Pullman Company has no motive power, and is dependent upon the railroad company for transportation of its cars;* so that, if the railroad company had refused to haul the car Ysadora, the Pullman Company would have been under obligations to permit petitioners to occupy the state room therein, or

in an equally comfortable car, until such time as the railroad did attach and transport such car. The Pullman Company had no right to deprive petitioners of their accommodation; and if the railroad company had such right, it was conferred by the voluntary contract of the Pullman Company, without the knowledge or the consent of petitioners, and the Pullman Company having authorized the railroad company to deprive petitioners of their contract rights, it can not escape liability therefor.

If the Pullman Company had shown, which it did not, that it tendered to the railroad company at Denver, September 28th, a car equal in comfort to the Ysadora, and that the railroad company refused to transport such car, then perhaps it might escape liability for not tendering petitioners at Texline a drawing room in which to continue their journey; but the Pullman Company would even then have been under obligation to furnish petitioners the best accommodations in the car which the railroad company did haul. But instead of reserving two double lower berths for petitioners, they were tendered one unsold upper berth, which they could not occupy, and after petitioners had waited a day and the half of two nights for the Pullman Company to furnish them the state room of which they had been deprived, they were informed by the Pullman conductor that he could not help their infirmities; and, unaided by the Pullman conductor or porter, they sought for themselves and occupied such seats as they could procure in the ordinary day coach, and in the coach set aside for colored people, while the Pullman conductor and porter slept peacefully in the comfortable lower berths of the smoking section.

2. *Petitioners knew that the car Ysidora was part of the carrier's train;* but they had the right to occupy it as passengers of the railroad company, by reason of the fact that they had paid first-class passage; and they had the right as passengers of the Pullman Company to occupy the drawing room, because they had paid that company twenty dollars for this extra comfortable accommodation. Both the railroad company and the Pullman Company were under obligation to protect petitioners in the enjoyment of this drawing room; and neither of these companies

had the right to deprive them thereof. Petitioners did not know, nor did they have reason to believe, that the railroad company was by contract of the Pullman Company authorized to eject them from the drawing room; they did not know that the Pullman Company had parted with all control of its cars, internally and externally, and of the movements thereof, to the railroad company; they did not know that the Pullman Company had bound its servants to the carrier company, who might command them over their protests to eject petitioners from the drawing room at any time or place; they did not know that the Pullman Company was a corporation without liability for the breach of its contracts; they did not know that the only function of the Pullman Company was to take their money, and turn them over with their cars and servants to the tender mercies of the carrier, authorized to ignore their helpless condition and to disregard their contract rights.

3. *It is proper and reasonable that the railroad company should determine who may occupy Pullman cars attached to its trains, but only to that extent that it may eject improper and disorderly persons; that on through trains, through passengers only may occupy them; and that only those who have first class railroad tickets and have paid the Pullman Company's charges may ride therein.* But it has no such right to determine who may or may not occupy these cars as would authorize it to eject petitioners, who had paid first class passage to the carrier and also the charges of the Pullman Company for the drawing room they occupied. The contract of the Pullman Company gave the carrier no such right; and when the Pullman conductor and porter required petitioners to leave the drawing room, the Pullman Company became liable for breach of its contract, no matter whether the Pullman Company had or had not bound them by contract to obey the railroad. And when the car without drawing room accommodations was attached to the train of September 28th, the Pullman Company became liable for breach of its contract, for if the Pullman Company had the right to select a car similar to the Ysidora, it is liable because it did not do so; and if the railroad company had the right to select the car on that day, the Pullman Com-

pany is still liable, because the carrier company acted under power voluntarily conferred by the Pullman Company, and did only that which the Pullman Company authorized it to do.

AUTHORITIES AND REMARKS.

The Circuit Court of Appeals cites Railway v. Roy, 102 U. S., 451, as authority for its decision in this cause.

As we understand that decision it is: That for the purpose of the railway company's contract to carry Roy over its line, and for that purpose only, the conductor and porter of the sleeping car company were in law the servants and employes of the railway company; and it was so held solely on the ground that the railroad company was under obligation to use only such cars as were adequate for safe conveyance.

The railway company was held liable to Roy, not because the conductor and porter were, for the purposes of transportation, held to be its servants; for the opinion discusses the liability of the carrier at length on pages 455-6 and 7, citing many authorities, and holds that "it is responsible for injuries received by passengers in the course of transportation, which might have been avoided or guarded against by the exercise on its part of extraordinary vigilance, aided by the highest skill, and this caution and vigilance must necessarily be extended *to all agencies or means* employed by the carrier in the transportation of passengers."

And on page 458 the court very clearly indicates that if the sleeping car company had been a co-defendant, and had action been pending also against it by the carrier, the court would have held the sleeping car company also liable to Roy and further liable to the carrier.

Pullman Co. v. Taylor, 65 Ind., 153 (32 Am. Rep., 57), is identical with the case at bar, and the law of this cause.

Taylor purchased and had assigned to him a particular berth in defendant's car 96; petitioners purchased and had assigned to them the drawing room in the car Ysidora.

The car occupied by Taylor was detached at Pittsburg, and the Ysidora was detached at Texline. Taylor was offered a less comfortable berth in a less safe car in which to complete his journey from Pittsburg, which he declined; and petitioners, *an aged, crippled woman, and her daughter with her sick child, three persons*, were offered at Texline September 28, in lieu of the comfortable drawing room in the Ysidora, *one upper berth* in which to complete their journey from Texline, which they declined. The court held that Taylor "was entitled to a continuous passage in the same car and berth, or in one equally safe, comfortable and convenient; and that it was no defense that the defendant simply rented the cars to the railway companies for the use of passengers," and the Circuit Court of Appeals should have held that the Pullman Company should have tendered petitioners at Texline, September 28, a drawing room in which to continue their journey, equally safe and comfortable to that in the Ysidora; and that is no defense that defendant had rented its cars to the railway company for the use of passengers.

To the same effect as the Taylor case, we cite Kinsley v. Railway, 125 Mass., 54 (28 Am. Rep., 200, and note 202); also, Thorpe v. Railway, 32 Am. Rep., 325.

Dupre v. Mann Boudoir Car Company, 54 Federal Reporter, 646, is decisive of this case.

The berth in letter "B" was sold to Dupre by mistake; but there was no mistake in selling petitioners the drawing room of the Ysidora. Dupre was deprived of the berth in letter "B," *by the standing order of the railroad company* to reserve all berths in letter "B" for Meridian; and petitioners were deprived of the drawing room in the Ysidora *by the Pullman conductor and porter*, acting, as is claimed, under *direction of the railroad con-*

ductor. The Circuit Court of Appeals, in the Dupre case, held that to escape liability to Dupre, the Pullman Company must have shown that it tendered him a berth in the car equal to that in letter "B" of which he was deprived, and that Dupre left the car without being compelled to do so by the Pullman conductor. Query: What should have been the decision of the same court in this cause?

REMARKS.

If the decision by the Circuit Court of Appeals be the law of this case, then indeed is defendant a most favored corporation; for it may contract with impunity, and avoid liability by pleading impotence, utter helplessness, and total incompetence; and it matters not that its condition is a voluntary one, concealed from the traveling public with whom it contracts.

If the law of this cause be, as held by the Circuit Court of Appeals, that defendant is without liability, then defendant has no liability or responsibility in any case, and its only obligation was to permit petitioners to *enter* the drawing room, and leave it to the discretion of the carrier to eject them at will at any time or place; and this, too, notwithstanding petitioners had no notice that the defendant had authorized the carrier to so do.

The logical deduction from this decision of the Circuit Court of Appeals is, that defendant had neither right to contract nor ability to perform; that petitioners are chargeable with knowledge of the existence of a secret and concealed contract which made the Pullman Company utterly helpless to perform its contract obligations, and placed it entirely at the mercy of the carrier to whom it had voluntarily parted with all right, authority and ability to perform any contract.

As we understand the decision of the Circuit Court of Appeals, the Pullman Company is exempt from liability, because it had by contract with the carrier deprived itself of ability to perform; that the carrier alone had the ability, and it, not defendant, deprived petitioners of their accommodation in the drawing room. That the carrier, who was in no sense a party to the contract for drawing room accommodations, violated it, and de-

prived petitioners of their contract rights, may be considered anomalous, still we so understand the decision in the Circuit Court of Appeals and of the court below.

We submit that it was the duty of the defendant in making its contract with the carrier, to reserve such right of selection, direction and control of its cars and servants as would permit it to carry out its contracts, and enable it to protect the contract rights of petitioners; and that in depriving itself by voluntary contract with the carrier of all right, power and means of performing its contract obligations, defendant became liable for the acts of the carrier it authorized to be done in disregard of petitioners' contract rights.

We submit further, that when defendant authorized the carrier to select a car September 28th without drawing room accommodations, this act deprived petitioners of drawing room accommodations from Texline to the Canadian river; and when defendant bound its servants to the carrier, they were impotent to protect the maimed and helpless petitioners for whom, it is claimed, they interceded.

If the Pullman Company by contract parted with the selection, control, management and direction of its cars, externally and internally, to the railroad company, and bounds its agents and servants to the carrier company, they had no voice against the carrier's will, and their mild objections and timorous protests were complacently and with impunity ignored; as they were bound by defendant to their master, the carrier, so they obeyed and ejected petitioners from the drawing room, to which defendant had neither right to assign them, nor ability to protect them in the enjoyment thereof.

We submit that if petitioners had knowledge, which they did not, of the utterly helpless condition of defendant, that this would not justify defendant in wilfully contracting to do that which it was powerless to perform. Certainly not, if the law is that he who contracts is presumed to have the ability to perform his contract obligations.

We further submit that if the carrier company might, under the rules, regulations and contract with defendant, eject petitioners at Texline, even commanding directly and controlling

defendant's servants over their protests in doing so, that the carrier could also have ejected them at Trinidad, or even at the station in Denver before petitioners began their journey. In which case, if petitioners had any contract rights they should have sought redress as they do here, against the defendant with whom they contracted, and defendant might seek redress of its wrongs from the carrier with whom it had contracted.

And finally, if the carrier might select a car without a drawing room, September 28th, and deprive petitioners of such accommodations from Texline to the Canadian river, it had the right to select such car September 27th, or on any other day, and deprive them of such accommodations for the entire journey from Denver to Fort Worth. So it follows, that the Pullman Company, *as it contends*, was, by its contract, rules and regulations deprived of all authority and ability to perform any contract. It could not even protect petitioners in the right to occupy the drawing room while the car Ysidora stood at the station in Denver; for if the carrier, under the contract, rules and regulations, controlled the car internally as well as externally, and might say when and where it should or should not go, and determine who might or might not occupy it, and where and when they should be ejected, and command defendant's agents and servants over their protests in doing so, then the carrier might have ejected petitioners from the drawing room at Denver, before they began their journey, as is claimed the carrier did at Texline.

In conclusion, we submit that the Taylor and Dupre cases is the law of this cause; and we ask this court of last resort to grant the writ hereinbefore prayed for, to the end that justice may prevail, and that the Pullman Company, as all other contracting parties, shall be held liable for breach of its contract obligations.

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